

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.

FILED

FEB 13 1976

MICHAEL RODAK, JR., CLERK

No. **75-1153**

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

JURISDICTIONAL STATEMENT

Of Counsel:

KELLER, THOMA, TOPPIN
& SCHWARZE, P.C.
Detroit, Michigan

RAYMOND J. LaJEUNESSE, JR.
Fairfax, Virginia

February 13, 1976

JOHN L. KILCULLEN

Webster, Kilcullen & Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Appellants

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| The Opinions Below | 2 |
| Statement of the Grounds on Which the Jurisdiction of This Court is Invoked | 3 |
| Questions Presented by the Appeal | 6 |
| Statement of the Case | 7 |
| Substantiality of the Federal Questions | 13 |
| I This Court's earlier opinion on compulsory unionism in private employment is irrelevant to Appellants' claim that the requirement of financial support of a labor union as a condition of public employment violates their freedom of association | 14 |
| II Because the Michigan "agency fee" statute sanctions the use of nonunion employees' coerced fees for purposes other than collec- tive bargaining, it is repugnant to the First Amendment both as applied to Appellants and on its face | 20 |
| a. Under this Court's precedents Appellants made sufficient protests to challenge the constitutionality of the "agency fee" statute as applied to them | 22 |
| b. Under this Court's precedents the "agen- cy fee" statute is facially overbroad | 24 |
| Conclusion | 27 |
| Appendix A | |
| Opinion of the Circuit Court for the County of Wayne, Michigan, January 19, 1970 | 1a |
| Opinion of the Circuit Court for the County of Wayne, Michigan, November 5, 1973 | 7a |
| Opinion and Order of the Court of Appeals of Michigan | 11a |

(ii)

Page

Appendix B

| | |
|---|-----|
| Summary Judgment of the Circuit Court for the County of Wayne, Michigan, January 23, 1970 | 1b |
| Order of the Supreme Court of Michigan, December 28, 1972 | 4b |
| Summary Judgment of the Circuit Court for the County of Wayne, Michigan, December 5, 1973 | 6b |
| Order Denying Rehearing of the Circuit Court for the County of Wayne, Michigan | 9b |
| Order Denying Rehearing of the Court of Appeals of Michigan | 11b |
| Orders of the Supreme Court of Michigan, September 17, 1975 | 13b |

Appendix C

| | |
|------------------------|----|
| Notice of Appeal | 1c |
|------------------------|----|

TABLE OF AUTHORITIES

Cases:

| | |
|--|-------|
| A.F.S.C.M.E. v. Woodward, 406 F.2d 137 (8th Cir. 1969) | 18 |
| Albertson v. Millard, 345 U.S. 242 (1953) | 21 |
| Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) | 4,25 |
| Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973) | 19 |
| Brotherhood of Railway Clerks v. Allen, 373 U.S. 113 (1963) | 22-25 |
| Buckley v. Valeo, ____ U.S. ____, 44 U.S.L.W. 4127 (Jan. 30, 1976) (No. 75-436) | 19 |
| Coleman v. Alabama, 399 U.S. 1 (1970) | 21 |
| Cort v. Ash, ____ U.S. ____, 95 S.Ct. 2080 (1975) | 28 |
| Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) | 4 |

(iii)

Page

| | |
|--|-------------|
| Dombrowski v. Pfister, 380 U.S. 479 (1965) | 25 |
| Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940) | 21 |
| Fire Fighters, Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) | 16-17 |
| Gibson v. Florida Legislative Investigation Commit- tee, 372 U.S. 539 (1963) | 19 |
| Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), <i>cert. denied</i> , 410 U.S. 928 (1973) | 18-19 |
| International Association of Machinists v. Street, 367 U.S. 740 (1961) | 15,20-25 |
| Lathrop v. Donohue, 367 U.S. 820 (1961) | 23 |
| Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973) | 18 |
| Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954) | 5 |
| Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970) | 25 |
| N.A.A.C.P. v. Button, 371 U.S. 415 (1963) | 18,25-26 |
| New York <i>ex rel.</i> Bryant v. Zimmerman, 278 U.S. 63 (1928) | 5 |
| People <i>ex rel.</i> McCollum v. Board of Education, 333 U.S. 203 (1948) | 5 |
| Perry v. Sindermann, 408 U.S. 593 (1972) | 18 |
| Police Officers' Guild v. Washington, 369 F. Supp. 543 (D.D.C. 1973) (three-judge court) | 18 |
| Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) | 14-17 |
| Shelton v. Tucker, 364 U.S. 479 (1960) | 18-19,26-27 |
| Sherbert v. Verner, 374 U.S. 398 (1963) | 27 |
| Smigel v. Southgate Community School District, 388 Mich. 531, 202 N.W.2d 305 (1972) | 3,9,10,21 |

| | |
|--|----|
| Smith v. United States, 502 F.2d 512 (5th Cir. 1974) | 19 |
| Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) | 25 |
| Torcaso v. Watkins, 367 U.S. 488 (1961) | 18 |
| United States v. O'Brien, 391 U.S. 367 (1968) | 18 |
| West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) | 18 |
| Winston-Salem/Forsyth County Unit, Educators Association v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974) (three-judge court) | 16 |

Statutes:

| | |
|---|----------------|
| Michigan Statutes Annotated | |
| Section 17.455(10) | 4-6,9-12,19-21 |
| Minnesota Statutes Annotated | |
| Section 179.65[2] | 20 |
| United States Code: | |
| Title 28, U.S.C. Section 1257(2) | 4 |
| Title 45, U.S.C. Section 151 <i>et seq.</i> | 14 |
| Title 45, U.S.C. Section 152, Eleventh | 21 |

Constitutional Provisions:

| | |
|-----------------------------------|-------------------------|
| Constitution of the United States | |
| First Amendment | 3,6-8,10-15,17-20,22-28 |
| Fifth Amendment | 15 |
| Fourteenth Amendment | 3,6-7,10-12,14,22,24-26 |

Other Authorities:

| | |
|---|----------|
| Blair, <i>Union Security Agreements in Public Employment</i> , 60 <i>Cornell L. Rev.</i> 183 (1975) | 13,16,20 |
| Michigan General Court Rules 1963 | |
| Rule 521 | 3 |
| Rule 718 | 3 |
| Rule 800 | 21 |
| Rule 813 | 11 |
| Petro, <i>Sovereignty and Compulsory Public-Sector Bargaining</i> , 10 <i>Wake Forest L. Rev.</i> 25 (1974) | 16 |

| | |
|--|----|
| Summers, <i>Public Employee Bargaining: A Political Perspective</i> , 83 <i>Yale L. J.</i> 1156 (1974) | 16 |
| U.S. Bureau of the Census, <i>Dep't of Commerce, Statistical Abstract of the United States</i> 265 (95th ed. 1974) | 13 |
| United States Supreme Court Rule 15 | 2 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No.

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants in these two consolidated cases appeal from that part of an opinion and order of the Court of Appeals of Michigan which affirmed a trial court judgment sustaining against federal constitutional chal-

lenge the requirement that Michigan public employees as a condition of employment financially support an exclusive bargaining agent which is permitted by state statute to use nonunion employees' coerced payments for purposes other than nonpolitical collective bargaining. The Supreme Court of Michigan has denied appellants' application for leave to appeal. As the two cases involve identical questions and were considered together by the courts below, a single jurisdictional statement is submitted by appellants in accordance with paragraph 3 of Rule 15 of this Court.

THE OPINIONS BELOW

The opinion of the Circuit Court for Wayne County, Michigan (Appendix¹ A, pp. 7a-10a), is unofficially reported at 84 L.R.R.M. 3008. The opinion of the Michigan Court of Appeals (App. A, pp. 11a-21a) is reported at 60 Mich. App. 92, 230 N.W.2d 322. The orders of the Supreme Court of Michigan denying appellants' application for leave to appeal are set forth in Appendix B, pp. 13b-16b.

An earlier opinion of the Circuit Court (App. A, pp. 1a-6a) is unofficially reported at 73 L.R.R.M. 2237, 61 CCH Lab. Cas. ¶52,225. The order of the Supreme Court of Michigan vacating the summary judgment entered by the Circuit Court in favor of appellees in accordance with that earlier opinion is set forth in Appendix B, pp. 4b-5b.

¹ Hereinafter "App." All Appendix references herein are to the appendices printed as an attachment to this Statement, *infra*.

The opinions of the Supreme Court of Michigan in a related case pursuant to which the earlier summary judgment herein was vacated are reported at 388 Mich. 531, 202 N.W.2d 305.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) These are proceedings brought by Detroit school teachers and counselors (hereinafter "Appellant Teachers") seeking a declaratory judgment and injunctive relief, pursuant to Michigan General Court Rules 1963, 521 and 718, as to the constitutionality of the compulsory "agency shop" arrangement entered into between the Detroit Board of Education (hereinafter the "Board") and the Detroit Federation of Teachers (hereinafter the "Federation"). Under this arrangement Appellant Teachers are compelled as a condition of employment to either join or pay to the Federation each month a "service fee" equivalent to the membership dues established by the Federation. The complaints alleged, *inter alia*, that this scheme in itself, and the use by the Federation of funds collected through it for purposes other than collective bargaining, deprive Appellant Teachers of rights and freedoms secured by the First and Fourteenth Amendments to the United States Constitution. After one appeal to the Supreme Court of Michigan, on remand the Circuit Court for Wayne County, Michigan, issued an opinion on November 5, 1973 (App. A, pp. 7a-10a), and entered an order on December 5, 1973 (App. B, pp. 6b-8b), granting appellees' motion for summary judgment in both cases, holding that the "agency shop" was authorized by Section 10 of the Michigan Public

Employment Relations Act (hereinafter "PERA"), Mich. Stat. Ann. § 17.455(10) (1974 Cum. Supp.), as amended by Pub. Act 25, Mich. L. 1973, and is valid under the Constitution of the United States. The Circuit Court denied appellants' motion for rehearing on January 24, 1974 (App. B, pp. 9b-10b).

(ii) The judgment or decree sought to be reviewed is the opinion and order entered on March 31, 1975, by the Court of Appeals of Michigan in favor of the validity on its face of Section 10 of the Michigan PERA, as amended by Pub. Act 25, Mich. L. 1973, and denying Appellant Teachers relief as to its validity as applied. (App. A, pp. 11a-21a). Appellants' application for rehearing on the constitutional issue was denied by the Court of Appeals on May 15, 1975 (App. B, pp. 11b-12b). The Supreme Court of Michigan denied their application for leave to appeal by orders entered on September 17, 1975 (App. B, pp. 13b-16b). The Notice of Appeal was filed in the Circuit Court for Wayne County, the court possessed of the record, on November 28, 1975 (App. C, pp. 1c-3c). On December 5, 1975, Honorable Potter Stewart, Associate Justice of this Court, extended appellants' time to docket the appeal in this Court to February 14, 1976.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court include:

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975);

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3 (1963);

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-60 (1954);

People ex rel. McCollum v. Board of Education, 333 U.S. 203, 204-06 (1948);

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

(v) The validity of Section 10 of the Michigan PERA, Mich. Stat. Ann. § 17.455(10) (1974 Cum. Supp.), as amended by Pub. Act 25, Mich. L. 1973, is here involved. The text of that Section as pertinent to this case is:

(1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in Sec. 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * *.

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues

uniformly required of members of the exclusive bargaining representative.

The proviso to subsection (1)(c) and subsection (2) were added by Public Act 25 of 1973, signed into law on June 14, 1973.

QUESTIONS PRESENTED BY THE APPEAL

1. Section 10 of the Michigan PERA authorizes agencies of the State to compel public employees to contribute financial support to unions as a condition of public employment. Does this state statute on its face violate the ban in the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, on laws abridging freedom of association?

2. The Court of Appeals of Michigan held that Section 10 of the Michigan PERA was intended by the Michigan legislature to allow public sector unions to use coerced "service fees" for purposes other than collective bargaining, including political and ideological purposes.

(a) Did Appellant Teachers by their respective complaints make sufficient protests of political and other non-collective bargaining spending by defendant union to have standing to challenge the federal constitutionality, as applied to them, of the statute sanctioning such expenditures?

(b) Regardless of the sufficiency of appellants' protests, does this statute as interpreted by the Michigan Court of Appeals violate by reason of overbreadth the ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws abridging freedom of expression and association?

STATEMENT OF THE CASE

Appellant Teachers in these two consolidated cases are more than 600 Detroit teachers and counselors who brought suit in Wayne County Circuit Court seeking declaratory and injunctive relief as to the constitutionality of the compulsory "agency shop" arrangement entered into in July 1969 between appellee Board and appellee Federation, effective January 26, 1970 (successive agreements have contained substantially the same arrangement). Under this arrangement appellants are compelled as a condition of employment to either join or pay to the Federation each month a "service fee" in the same amount as the union's membership dues.

The complaints alleged, *inter alia*, that this scheme in itself, and in its operation and effect, infringes on Appellant Teachers' freedom of association and other freedoms guaranteed them by the First and Fourteenth Amendments to the United States Constitution. *Aboud* Complaint, Count II ¶6(A); *Warczak* Amended Complaint, Prayer for Relief ¶2(A), (C). Each complaint specifically alleged that dues and "service fees" collected by the Federation were used for political and other purposes not collective bargaining in nature of which appellants did not approve. *Aboud* Complaint, Count II ¶4; *Warczak* Amended Complaint ¶13.

The *Warczak* case (Mich. Ct. App. Docket No. 19523) was filed on November 9, 1969, and the defendants immediately moved for summary judgment. On January 12, 1970, in opposition to that motion appellants made an offer of proof that the Federation was using sums collected under the "agency shop" scheme for political and other non-collective bargaining

activities to which Appellant Teachers objected.² Both sides briefed the question of the First Amendment constitutionality of the "agency shop" arrangement if authorized by the Michigan PERA. Brief of Federation in Support of Motion for Summary Judgment at 39-44a (Mich. Cir. Ct., Dec. 18, 1969); Brief for Plaintiffs on Motion for Summary Judgment at 25-36 (Mich. Cir. Ct., Dec. 18, 1969).

On January 19, 1970, the Circuit Court issued an opinion (App. A, pp. 1a-6a), holding that the "agency shop" was "a condition of employment agreed upon by the contracting employees" and as such authorized by the PERA, that the "agency shop" did not violate freedom of association on its face because it did not require union membership, and that Appellant Teachers' as applied First Amendment claims were premature. The Circuit Court concluded "that the agency shop provision is not repugnant to any statute or constitutional provision" (*id.* at 6a), and on January 23, 1970, entered its order granting summary judgment for failure to state a claim on which relief can be granted (App. B, pp. 1b-3b).

A claim of appeal was filed by Appellant Teachers with the Michigan Court of Appeals.³ Prior to any

²The offer of proof included affidavits of several individual appellants setting forth facts within their personal knowledge, with documentation, respecting the Federation's regular and substantial use of funds for political and social purposes, including the promotion of specific candidates for public office, specific legislation, and other specific public issues, and the affiants' opposition to such expenditures.

³The grounds of this appeal included the *per se* and as applied First Amendment unconstitutionality of the PERA if it authorized the "agency shop." Brief in Support of Claim of Appeal at 32-59 (Mich. Ct.App., Jun. 2, 1970).

action by the Court of Appeals, the Federation filed a motion for by-pass appeal to the Michigan Supreme Court. On November 29, 1972, the latter Court held in *Smigel v. Southgate Community School District*, 388 Mich. 531, 202 N.W.2d 305 (1972), that an "agency shop" arrangement which required non-members to pay a "representation fee equivalent to the dues and assessments" of the union "is clearly prohibited by Section 10 of the Public Employment Relations Act, as of necessity either encouraging or discouraging membership in a labor organization." *Id.* at 543, 202 N.W.2d at 308. On December 28, 1972, a Michigan Supreme Court order granted the by-pass appeal in *Warczak*, vacated the summary judgment, and remanded to the Circuit Court for further proceedings consonant with the *Smigel* decision (App. B, pp. 4b-5b).

The *Abood* case (Mich. Ct. App. Docket No. 19465) had been filed in Wayne County Circuit Court on April 23, 1970, and held in suspension pending the outcome of the *Warczak* appeal. Before any further action was taken by the Circuit Court in either case, Section 10 of the PERA was amended on June 14, 1973, by Public Act 25 of 1973 expressly to authorize "agency shop" arrangements requiring public employees to pay "service fees" equivalent in amount to union membership dues. The Federation then moved for summary judgment in both cases on July 5, 1973, for failure to state a claim upon which relief can be granted, on the basis of Public Act 25 and of "the meritorious reasons set forth in this Court's original Summary Judgment for Defendants * * *."⁴ Brief in Support of Motion of Defendants

⁴The Circuit Court's original summary judgment order had specifically "ADJUDGED that the said agency shop clause does not contravene the Constitution of the United States * * *." (App. B at 3b).

for Summary Judgment in Their Behalf, On Remand, at 3 (Mich. Cir. Ct., Jul. 5, 1973). In opposing the motion Appellant Teachers contended that the pleadings placed "the basic constitutional issues regarding the validity of an agency shop * * *," not adjudicated in *Smigel*, squarely before the Circuit Court. Memorandum in Opposition to Motion of Defendants for Summary Judgment in Their Behalf at 5 (Mich. Cir. Ct., Jul. 13, 1973).

The Circuit Court issued an opinion on November 5, 1973 (App. A, pp. 7a-10a), and entered an order on December 5, 1973 (App. B, pp. 6b-8b), granting appellees' motion for summary judgment in both cases. The order specifically adjudged that Public Act 25 "authorizes agency shop agreements in public employment * * *" and "that said agency shop clause does not contravene the Constitution of the United States * * *." Appellant Teachers' motions for rehearing reiterating their "position that the agency fee arrangement violates [their] constitutional rights of freedom of association * * * guaranteed by the First * * * and Fourteenth Amendments to the Constitution of the United States * * *", Memorandum Brief at 2 (Mich. Cir. Ct., Dec. 21, 1973), were denied by the Circuit Court on January 24, 1974 (App. B, pp. 9b-10b).

Appellant Teachers filed a claim of appeal with the Michigan Court of Appeals in each case on February 11, 1974. By order of the Court of Appeals dated March 22, 1974, the *Warczak* and *Abood* appeals were consolidated. Appellants' appeal presented the following question, *inter alia*:

C. WHETHER THE AGENCY SHOP CLAUSE CONTAINED IN THE DEFENDANTS' COLLECTIVE BARGAINING AGREEMENT, IMPOSED UNDER COLOR OF SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT, VIOLATES PLAINTIFF TEACHERS' RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Brief in Support of Claim of Appeal at 1 (Mich. Ct. App., Apr. 11, 1974).⁵ Appellants argued that question at length, *id.* at 17-59, 66-70; Appellants' Reply Brief (Mich. Ct. App., Jan. 24, 1975), specifically contending that the authorizing statute "is unconstitutional on its face and as applied" on First Amendment grounds, Brief in Support of Claim of Appeal at 45. The appeal requested "an order granting declaratory and injunctive relief declaring the agency shop clause *and Sections 10(1)(c) and (2) of PERA unconstitutional under both the Federal and Michigan Constitutions****." *Id.* at 80 (emphasis added). Though appellees disputed Appellant Teachers' standing to raise some of the as applied constitutional claims, appellees conceded that the issue of "whether there is any constitutional infirmity in the agency shop clause in question *or in the Act authorizing it*" was "*squarely presented*" by the appeal, Brief of Defendants-Appellees at 5 (Mich. Ct. App., Jul. 19, 1974) (emphasis added), and set forth their rebuttal on that federal constitutional question, *id.* at 5-32.

⁵In the practice of Michigan questions presented on Appeal to the Court of Appeals are raised by a "Statement of Questions Involved" set forth in the appellants' brief. *Mich. Gen. Ct. R.* 1963, 813.

In a per curiam decision issued March 31, 1975, the Michigan Court of Appeals held that the requirement of payment of "service fees" by Appellant Teachers does not violate their First and Fourteenth Amendment rights to freedom of speech and association, and that, though the use of funds collected under a statutorily authorized "agency shop" arrangement for non-collective bargaining purposes could violate appellants' First Amendment rights, they are not entitled to relief on this basis. 60 Mich. App. 92, 230 N.W.2d 322, 325-27 (App. A, pp. 11a, 17a-21a). Appellants' application for rehearing on these constitutional questions was denied by the Court of Appeals on May 15, 1975 (App. B, pp. 11b-12b). In rejecting the appellants' contentions the Court of Appeals applied and enforced to the appellants' disadvantage a state statute which the appellants at all stages had insisted was on its face, and if so applied and enforced, repugnant to the First Amendment, made applicable to the states by the Fourteenth Amendment.

Appellant Teachers' timely application for leave to appeal brought to contest the Court of Appeals' failure to declare Public Act 25 of 1973 and the "agency shop" arrangement violative of the federal Constitution was denied without opinion by the Michigan Supreme Court on September 17, 1975 (App. B, pp. 13b-16b). The identical orders entered in each case stated:

On order of the Court, the application for leave to appeal by plaintiffs-appellants is considered and the same is hereby DENIED because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

The Michigan Supreme Court having declined to take jurisdiction, the Court of Appeals is the highest court in the State of Michigan in which a decision could be had.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

The questions presented on this appeal have never been passed upon by this Court. With the recent advent of militant public sector unionism and the passage of state statutes providing for collective bargaining through exclusive representatives in the public sector,⁶ the issue of the permissible limits of collective bargaining agreements in public employment relative to the constitutional rights of individual public employees is of great public importance. It is of particular importance to the millions of individual public employees.⁷ This appeal squarely raises two substantial questions of the extent to which public employees may be required under state law to support financially an unwanted collective bargaining agent without violating their First Amendment freedoms of speech and association.

⁶Though the number is in flux, one recent count was that 36 states have enacted laws permitting or requiring public sector collective bargaining. Blair, *Union Security Agreements in Public Employment*, 60 *Cornell L. Rev.* 183, 183-85 & n.8 (1975). At that time 13 states had provisions in their public employment bargaining statutes expressly sanctioning various forms of compulsory unionism. *Id.* at 208 & n.122.

⁷In 1973 there were 11,353,000 state and local government employees. *U.S. Bureau of the Census, Dep't. of Commerce, Statistical Abstract of the United States* 265 (95th ed. 1974).

I.

This Court's Earlier Opinion on Compulsory Unionism in Private Employment Is Irrelevant to Appellants' Claim That the Requirement of Financial Support of a Labor Union as a Condition of Public Employment Violates Their Freedom of Association.

Appellant Teachers alleged and offered to prove that, above and beyond "non-collective bargaining" spending, the requirement of financial support of the "collective bargaining" activities of the appellee union is itself an abridgement of their First and Fourteenth Amendment freedoms. *Abood* Complaint, Count II ¶ 6(A); *Warczak* Amended Complaint, Prayer for Relief ¶ 2(A). Nevertheless, on an otherwise barren record and without any analysis of the serious constitutional claims asserted, the Michigan Court of Appeals cited *Railway Employees' Department v. Hanson*, 351 U.S. 225, 238 (1956), for the proposition that statutes authorizing collective bargaining arrangements which require dissenting employees financially to support unions certified as their exclusive representatives do not in any case on their face abridge First and Fourteenth Amendment liberty. 230 N.W.2d at 326 (App. A at 17a). This is a manifestly incorrect reading of *Hanson* and a failure to appreciate the determinative distinction between public and private employment.

The appellees in *Hanson* attacked a compulsory "union shop" provision negotiated in private industry under color of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, arguing that the provision abridged their freedoms of speech and association. Because of an inadequate record, however, the "[w]ide-ranged prob-

lems * * * tendered under the First Amendment" were not reached. See 351 U.S. at 236-38. Nowhere in the *Hanson* opinions is there even the slightest allusion to the rights of public employees.

In assuming that *Hanson* settled all freedom of association issues here, the Court of Appeals erroneously relied upon the bare conclusory language of that opinion that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work * * * does not violate either the First or Fifth Amendments." 351 U.S. at 238, quoted 230 N.W.2d at 326 (App. A at 17a). This language refers, however, to the portion of *Hanson* in which this Court applied the "rational basis" test to the "union shop" in private employment. 351 U.S. at 233-35. Under that test, the Court needed to determine only whether, *under any conceivable (not necessarily probable) circumstances*, coerced financial support of a private sector union engaged in "collective bargaining" could coexist with employees' freedom of association. The *Hanson* Court did no more than this. On a bare record, it *assumed* the possible existence of *private* sector unions the activities of which (i) would be limited strictly to a form of *non-political, non-ideological* "collective bargaining" not involving protected association, and (ii) would necessarily "benefit" all employees.⁸

⁸Thus the statement of the Court that "No more has been attempted here [than to require the beneficiaries of trade unionism to contribute to its costs]. * * * The financial support required relates * * * to the work of the union in the realm of collective bargaining." 351 U.S. at 235; see *International Association of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring).

However, the assumptions adopted in *Hanson* were made in a *private*, not a *public* sector context. In the private sector, it is perhaps conceivable that some unions might not be engaged in political and ideological activism as a necessary and inescapable part of their "collective bargaining" operations. In the public sector, quite the opposite presumption is required. Public sector unions such as the Federation are involved in a "collective bargaining" process inextricably connected to the formulation of governmental policy regarding the provision of public services, budgeting, and taxation — political activity by any reasonable definition of the term. See, e.g., *Winston-Salem/Forsyth County Unit, Educators Association v. Phillips*, 381 F.Supp. 644, 647-48 (M.D.N.C. 1974) (three-judge court); Blair, *supra* note 6, at 194-96; Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 *Wake Forest L. Rev.* 25 (1974); Summers, *Public Employee Bargaining: A Political Perspective*, 83 *Yale L.J.* 1156, 1197 (1974).

Public sector "collective bargaining" is no different in Michigan. In *Fire Fighters, Local 412 v. City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226 (1975), the Michigan Supreme Court split two-to-two on whether the Michigan law requiring compulsory arbitration of police and fire department labor disputes is an unconstitutional delegation of legislative power. But three of the four justices recognized the inherently political nature of public sector "collective bargaining." Justice Levin states in his opinion, concurred in by Chief Justice Kavanagh:

The arbitrator/chairman of the panel is entrusted with the authority to decide major questions of public policy concerning the conditions of public

employment, the levels and standards of public services and the allocation of public revenues. *Those questions are legislative and political * * *.*⁹

Justice Williams is even more direct in his separate opinion:

[I]t is impossible to separate public-sector collective bargaining from other aspects of the political process.¹⁰

Therefore, in uncritically transplanting *Hanson* to a context in which the assumption that union "collective bargaining" might be *non-political* has no rational basis, the Michigan Court of Appeals erred. Because *public* sector "collective bargaining" is *inherently political*, all requirements of financial support of unions imposed on dissenting public employees raise First Amendment freedom of speech and freedom of association issues of the utmost gravity which this Court should determine.

Moreover, in adopting the conclusion of *Hanson* without independent analysis, the Court of Appeals did not apply the tests which this Court has repeatedly said are necessary to justify a governmental intrusion upon fundamental freedoms of *public* employees. As already noted, because of an inadequate record and the assumptions entertained concerning private sector unionism, *Hanson* applied the "rational basis" test. Here, where the sharply defined fundamental rights of public employees are at stake, *Hanson* is irrelevant and a more

⁹394 Mich. 229, 231 N.W.2d at 228 (Levin, J.) (emphasis added). The point is explicated at other places in Justice Levin's opinion. 231 N.W.2d at 232, 235, 238-40.

¹⁰394 Mich. 229, 231 N.W.2d at 253 (Williams, J.); see 231 N.W.2d at 253 & n.3, 264.

stringent test is required by an unbroken line of decisions, all relatively recent, of the courts of the United States, including this Court. It is now clear that public employment may not be denied or terminated for reasons which unconstitutionally impinge upon freedom of association or speech. *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972), and cases cited therein. And governmental action impinging upon freedom of association or speech is unconstitutional unless it is the least restrictive means necessary to achieve a compelling state interest. *E.g.*, *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 438-44 (1963); *Shelton v. Tucker*, 364 U.S. 479, 485-90 (1960) (statute requiring *public teachers* to file as condition of employment annual affidavit reporting all organizational memberships and contributions held to violate freedom of association).

Uniformly basing their decisions upon the teachings of the foregoing cases, the United States Courts of Appeals and District Courts all across the nation have held consistently in recent years that the First Amendment protects the freedom of public employees to associate in labor organizations. *E.g.*, *Lontine v. VanCleave*, 483 F.2d 966 (10th Cir. 1973); *A.F.S.C.M.E. v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Police Officers' Guild v. Washington*, 369 F.Supp. 543 (D.D.C. 1973) (three-judge court). It goes without saying that the Amendment protects not merely the freedom *to* associate and speak, but also the freedom *not to* do so. *Torcaso v. Watkins*, 367 U.S. 488 (1961); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973) (state-imposed condition

that public employees affiliate with particular political party held invalid). And mere financial support of an organization is a protected form of association. *Buckley v. Valeo*, ____ U.S. ____, 44 U.S.L.W. 4127, 4133-34, 4146 (U.S. Jan. 30, 1976) (No. 75-436); *Shelton v. Tucker*, 364 U.S. at 480-81, 487-88; *Bond v. County of Delaware*, 368 F.Supp. 618, 619-20, 624-27 (E.D. Pa. 1973) (state-imposed condition that public employees contribute to particular political party held invalid).

In short, in positively authorizing state agencies to make payments to unions a condition of public employment, the State of Michigan has clearly infringed Appellant Teachers' freedom of association. The appellees were required to show, and the Michigan courts to find, that the "agency shop" scheme serves a compelling state interest by the least restrictive means necessary.¹¹ In upholding the validity of Section 10 of the PERA on its face against First Amendment claims without applying the proper test, the Court of Appeals ignored precedents established by this Court which appellants submit require reversal of the decision below.

¹¹ Indeed, whether the "agency shop" serves a compelling state interest is a matter of fact, for the appellees to prove at trial. See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 551 (1963); *Smith v. United States*, 502 F.2d 512, 517 (5th Cir. 1974):

In order for the government to constitutionally remove an employee from government service for exercising [First Amendment rights], it is incumbent upon it to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment.

Such a factual record was precluded by the trial court's disposition of these cases on summary judgment.

II.

Because the Michigan "Agency Fee" Statute Sanctions the Use of Nonunion Employees' Coerced Fees for Purposes Other Than Collective Bargaining, It Is Repugnant to the First Amendment Both as Applied to Appellants and on Its Face.

Unlike some public employment labor relations statutes which limit compulsory union "service fees" to the actual costs of negotiations and grievance adjustment,¹² Section 10 of the Michigan PERA explicitly permits "agency fees" equivalent to full union membership dues.¹³ The Appellant Teachers contended below that in allowing public sector unions to expend monies above and beyond the demonstrated costs of "collective bargaining", the Michigan legislature has implicitly authorized political spending by these unions. *E.g.*, Brief in Support of Claim of Appeal at 55-59 (Mich. Ct. App., Apr. 11, 1974). Thus these cases raise the important question reserved in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), as to the constitutionality of a legislative grant of authority to unions to compel ideological conformity among employees by levying political "taxes" upon them.

The Michigan Court of Appeals dealt at length with this question. Specifically noting that the political activities of labor organizations are well-recognized, and

¹² *E.g.*, Minn. Stat. Ann. § 179.65[2].

¹³ See text of § 10, *supra* p. 5-6. Several other state statutes are similar to Michigan's. See Blair, *supra* note 6, at 208-09 & nn.123-24.

that it is reasonable to assume that a portion of every union's budget goes to such activities as the support of candidates for public office and lobbying for the passage of legislation,¹⁴ the Court concluded that, since the Michigan statute "does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, it * * * sanctions the use of nonunion members' fees for purposes other than collective bargaining." 230 N.W.2d at 326 (App. A at 18a).¹⁵

The Court below then recalled that in *Street* constitutional questions had been avoided through construction of the Railway Labor Act's "union shop" provision, 45 U.S.C. § 152, Eleventh, so as to deny the railway unions the authority to use a dissenting employee's dues and fees for political purposes. Contrasting the statutory provision involved in *Street* with the Michigan public employee "agency shop" statute, the Court of Appeals recognized that, because no such limiting construction is admissible as to the Michigan law,¹⁶ it had to decide the constitutional

¹⁴ *Accord*, Smigel, 388 Mich. at 543, 202 N.W.2d at 308.

¹⁵ Though the Court of Appeals did not advert to it, the legislative history of 1973 Pub. Act. 25 supports this conclusion. See Brief in Support of Claim of Appeal, *supra*, at 55-59.

¹⁶ The Michigan Court of Appeals is a court of state-wide appellate jurisdiction, the decisions of which "are final except as reviewed by the Michigan Supreme Court on leave granted by the Supreme Court." Mich. Gen. Ct. R. 1963, 800. Its construction of a Michigan statute is binding on the federal courts. See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Albertson v. Millard*, 345 U.S. 242, 244 (1953); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

question. *Id.* (App. A at 18a-19a). And, pursuing the merits of that issue, it held that "the agency shop clause, [as authorized by the statute] *could* violate plaintiffs' First and Fourteenth Amendment rights." *Id.* at 327 (App. A at 19a) (emphasis added). But the Court proceeded to rule that Appellant Teachers were not entitled to relief because they had failed to allege that any of them had specifically protested the expenditure of their funds for political purposes. *Id.* (App. A at 21a). This ruling is erroneous for two reasons.

a. Under This Court's Precedents Appellants Made Sufficient Protests to Challenge the Constitutionality of the "Agency Fee" Statute as Applied to Them.

As a matter of law, Appellant Teachers did make sufficient protests. The protest rule was first enunciated by this Court in *Street*, 367 U.S. at 774. The correct reading of that rule was later explained fully in *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 119 n.6 (1963):

[Plaintiffs] first made known their objection to the [unions'] political expenditures in their complaint filed in this action; however, this was early enough. *Street*, 367 U.S., at 771.¹⁷

That is, in *Street* as in *Allen* this Court clearly held that a protest against political expenditures of compelled

¹⁷"The appellees who have participated in this action have *in the course of it* made known to their respective unions their objection to the use of their money for the support of political causes." 367 U.S. at 771 (emphasis added).

dues and fees is timely and sufficient if made in a plaintiff's complaint, as it was here. *Abood* Complaint, Count II ¶4; *Warczak* Amended Complaint ¶13. The complaint is the protest for *Street-Allen* purposes.

Secondly, as *Allen*, 373 U.S. at 118, makes clear, the allegation that coerced fees

"have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs" * * * sufficiently states a cause of action. It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union.

The Michigan Court's theory that, in order to preserve First Amendment freedoms of speech and association, "the employee must make known to the union those causes and candidates to which he objects," 230 N.W.2d at 327 (App. A at 21a), is contrary to the unequivocal rule laid down in *Allen*.¹⁸

¹⁸*Lathrop v. Donohue*, 367 U.S. 820 (1961), supports this interpretation of the *Street-Allen* rule. In *Lathrop* the majority of this Court found the constitutional issues ripe for decision despite the fact that the plaintiff did not specify those political activities of the integrated bar to which he objected. 367 U.S. at 849 (Harlan & Frankfurter, JJ., concurring); *id.* at 865 (Whittaker, J., concurring); *id.* at 866 (Black, J., dissenting); *id.* at 878 (Douglas, J., dissenting). The constitutional issues were not decided only because this majority did not agree on the result. See *id.* at 865-66 (Black, J., dissenting). Only Justice Brennan's plurality opinion found that the entire record in the case did not present the constitutional issues in concrete enough form. *Id.* at 844-48.

Since the Appellant Teachers' complaints completely fulfilled the pleading requirements of *Street* and *Allen*,¹⁹ constituting a sufficient protest, the Court of Appeals' determination that constitutional rights "could" be, but had not been, violated is wrong. That Court held that only the absence of an effective protest defeated appellants' claims under the First and Fourteenth Amendments. *Id.* (App. A at 19a-21a). When the premise falls, so does the conclusion. Having made effective protests through their complaints, Appellant Teachers were entitled to full relief on their constitutional claims.

b. Under This Court's Precedents the "Agency Fee" Statute Is Facially Overbroad.

Even if Appellant Teachers' complaints had *not* been an effective protest, the Michigan Court of Appeals' denial of protection against compulsory financial support of union political activities would nevertheless be erroneous — because the Michigan "agency shop"

¹⁹ *Warczak* Amended Complaint ¶13 specifically alleges that the Federation and its affiliated labor organizations

are engaged, in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature *of which plaintiffs do not approve*, and in which they will have no voice, and which are not and will not be collective bargaining activities * * *, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs * * *. (Emphasis added).

Abood Complaint, Count II ¶4 sets forth identical averments.

scheme is on its face repugnant to the First and Fourteenth Amendments on *overbreadth* grounds. The protest requirement, after all, arose in *Street* and *Allen* in the context of litigation under a private sector statute which this Court specifically construed so as not to permit the expenditure of dissenters' coerced dues and fees for political and ideological purposes. *Street*, 367 U.S. at 768-70. Here, *per contra*, the appellants challenged a public sector statute which the Court of Appeals found "admits of no such construction" as was employed in *Street*. 230 N.W.2d at 326 (App. A at 18a-19a).

This Court's overbreadth doctrine was summarized, in a public employment context, in *Muller v. Conlisk*, 429 F.2d 901, 903 (7th Cir. 1970) (citations omitted) (emphasis added):

[Where p]laintiff is a member of a group at which [a challenged law] is directed and, as such, his right to speak is presently subject to curtailment by [the law, t]his is sufficient to establish his standing to challenge the rule *quite apart from any specific sanction which has been imposed upon him for its violation.* * * *

* * * * The Supreme Court has repeatedly recognized that because "freedoms of expression in general * * * are vulnerable to gravely damaging yet barely visible encroachments," * * * *the mere threat of the imposition of sanctions is sufficient present infringement to justify redress.*²⁰

That is, an individual who *may* be injured by an unconstitutional application of an overbroad statute

²⁰ Citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963); *Soglin v. Kauffman*, 418 F.2d 163, 166 (7th Cir. 1969).

may complain of the rule itself, *even though he has yet to suffer injury*. The mere possibility that the statute may be unconstitutionally applied against him is enough. As this Court said in *Button*, 371 U.S. at 432 (emphasis added):

we will not presume that the statute curtails constitutionally protected activity as little as possible. * * * [T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. *For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible application of the statute in other factual contexts besides that at bar.*

Therefore, a specific protest by Appellant Teachers is unnecessary here. Because the Michigan "agency shop" scheme is overbroad on its face, the Court of Appeals need have considered no more than the possibility that the statute *could* be used to enforce political and ideological conformity upon any public employee, and should have invalidated the statute on that ground. Indeed, the Michigan Court specifically held that "the agency shop clause * * * *could* violate plaintiffs' First and Fourteenth Amendment rights." 230 N.W.2d at 327 (App. A at 19a) (emphasis added). That determination mandates a finding that the statute is unconstitutional.

The overbreadth doctrine is based upon the premise that statutes potentially impinging upon the exercise of fundamental freedoms must be narrowly and specifically drawn. As this Court said in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (footnote omitted) (emphasis added):

even though the governmental purpose be legitimate and substantial, *that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved*. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

That is, a statute which on its face threatens to impinge upon First Amendment freedoms is unconstitutional unless it is the *least* restrictive means necessary to achieve a *compelling* governmental interest. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1963).

The Court of Appeals here, however, has determined that the Michigan "agency shop" statute is *not* the least restrictive means available to promote the goal of "labor stability" advanced in support of the PERA. A less restrictive means, the Court recognized, would have been to "limit the nonmember's ['service fee'] contribution to his proportionate share of the costs of collective bargaining * * *." 230 N.W.2d at 326 (App. A at 19a). Since the "agency fee" scheme "sanctions the use of nonmembers' fees for purposes other than collective bargaining," *id.*, it is necessarily an *unselective* and *imprecise* means to achieve the legislative purpose — and therefore should be held repugnant to the First Amendment under this Court's precedents.

CONCLUSION

This is a case of far-reaching effect and fundamental importance. The Michigan Court of Appeals recognized that the "agency shop" scheme, adopted in a number

of states, seriously threatens basic freedoms of public employees:

[F]reedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join.

Id. Freedom of association is no less basic. See *Shelton v. Tucker*, 364 U.S. at 486. Nonetheless, the Michigan Court, purportedly following decisions of this Court, has held that the First Amendment does not prohibit the statutory requirement that public employees either suffer discharge from their employment or involuntarily subsidize private organizations which are *both* organizations which are *both* inherently political *and* permitted by state law to use coerced payments for extraneous political and ideological purposes.

This Court has never decided that the First Amendment is not violated when a state statute coerces public employees into political and ideological conformity, whatever the purpose. This question should now be determined, especially since the harm done is irreparable. For political and ideological viewpoints once promulgated, and political influence once applied, cannot be withdrawn from the marketplace of ideas, the voting booth, or the legislative chamber. See *Cort v. Ash*, ____ U.S. ____, 95 S.Ct. 2080, 2091 (1975). With fundamental rights at stake, the substantial questions

presented by these cases should not be determined without briefs and oral arguments.

Respectfully submitted,

JOHN L. KILCULLEN

Webster, Kilcullen & Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Appellants

Of Counsel:

KELLER, THOMA, TOPPIN & SCHWARZE, P.C.
Detroit, Michigan

RAYMOND J. LaJEUNESSE, JR.
Fairfax, Virginia

February 13, 1976

1a
APPENDIX A

**Opinion of the Circuit Court
for the
County of Wayne, Michigan,
dated January 19, 1970**

STATE OF MICHIGAN

**IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE**

**CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,**

Plaintiffs,

vs.

**Civil Action
No. 145080**

**THE BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF THE CITY
OF DETROIT, a statutory body
corporate; DETROIT FEDERATION
OF TEACHERS; MARY ELLEN
RIORDAN; JOHN ELLIOTT; et al.,**

Defendants.

OPINION

This matter comes before this Court on defendants' (Detroit Federation of Teachers and Detroit Board of Education) Motion for Summary Judgment under Michigan General Court Rule 117, predicated on the claim that plaintiffs have failed to state a cause of action. Specifically the plaintiffs claim that they are entitled to declaratory relief to determine the validity of the agency shop clause in the collective bargaining agreement between the defendant Detroit Board of

Education and defendant Detroit Federation of Teachers.

Plaintiffs filed this suit as a class action on behalf of themselves and others in a similar situation who are also school teachers who object to the requirement that they authorize deduction of service fees equal to the regular union dues or be terminated from employment. It appears that defendant Detroit Federation of Teachers has been certified as the exclusive bargaining representative of all teachers in the Detroit School System by virtue of the application of the procedures set forth in the Public Employment Relations Act.

The complaint filed by plaintiffs contends that the agency shop clause as it appears in the collective bargaining agreement is invalid as to these plaintiffs and all others in the same class for the following reasons:

1. This provision violates the constitutional guarantees of freedom of association and right to privacy.
2. It denies plaintiffs due process and equal protection as required by both State and Federal Constitutions.
3. Use of collected monies for purposes other than that germane to the contract itself is illegal as to them.
4. The clause is contrary to state statutes; namely, the Public Employment Relations Act, Michigan Teachers Tenure Act, Section 353, Chapter LI, Penal Code (MSA 28.585), and the Michigan General School Laws.

In regard to the question of freedom of association and right to privacy, it should be noted that the provision for an agency shop does not require plaintiffs or any of them to become members or join the defendant union. It does require that all persons

covered by the contract contribute an equal sum to the union designated as the bargaining agent for all the employees.

Plaintiffs contend that the provision in the collective bargaining agreement deprives them of certain guarantees under the due process clause. Nowhere can this Court find any arbitrary or discriminatory provisions in the principle of the agency shop clause. No employee will be prejudiced in or be deprived of his employment without the safeguards of due process. The contract itself provides for the following of the dismissal procedure of the Michigan Tenure Act which requires notices, hearing, representation, confrontation and a written record. On the issue as to whether the plaintiffs are being denied equal protection as guaranteed by the constitution, it does not appear that any employee in the bargaining unit is being in any manner discriminated against whether or not he is a union member. Each employee has all the rights and privileges of a member and all the protections and benefits guaranteed to members. He pays no more (or less) than a member for the services rendered to him.

Plaintiffs' contention that the use of the monies collected for purposes other than that germane to the bargaining and administration of the contract would be illegal as to them is a somewhat novel issue. It does not appear to have had much consideration by courts. One case touching upon it is *I.A.M. v. Street*, 367 U.S. 740, where, as a matter of statutory construction, the court held that the monies could not be used for certain purposes, but even in this case the Supreme Court held an injunction to restrain the collection was not to be permitted. To the same effect is the case of *Railroad*

Clerks v. Allen, 373 U.S. 113, wherein the case was returned to the trial court to determine the proportion of the dues used for improper purposes.

In the instant proceeding it does not appear that this is really an issue at this juncture. The matter before this Court is for declaratory relief from the enforcement of the particular clause. No money has been used for any purposes as yet, the authority appears to be that a restraining of the collection is not the proper remedy and in this context there may be an issue to be resolved in a proper proceeding as to what expenditure of the funds is proper. Perhaps in a suitable proceeding it may be decided that any expenditure in furtherance of legitimate union purposes may be permissible.

Finally, it is necessary to determine whether the agency shop clause in the agreement is contrary to or prohibited by any state statute. First, plaintiffs call this Court's attention to the Michigan Tenure Act which provides for discharge or demotion of a tenure teacher only for reasonable and just cause. Can this be reconciled with the agency shop clause which requires the dismissal of a teacher for failure to pay the service fee equivalent to the regular union dues? A reading of the contract will reveal that the constitutional safeguards of procedural due process as required by the Michigan Tenure Act be followed. If not against public policy and repugnant to any basic rights of individuals, it is most conceivable that this violation of the collective bargaining contract may justify discharge. The cases are myriad in holding that where the agency shop clause is violated an employee's discharge for violation of the clause was reasonable.

Secondly, plaintiffs call this Court's attention to the P.E.R.A. itself and contend that the agency shop clause is prohibited in that it is not specifically authorized. A comparison of P.E.R.A. with M.L.M.A. indicates that M.L.M.A. specifically authorizes it, P.E.R.A. is silent and therefore plaintiffs would contend that it is an indication that the legislature intended to provide for no form of union security in public employment contracts. This Court would conclude the contrary. P.E.R.A. authorizes contracts between employees and their public employers to cover conditions of employment. The agency shop is apparently a condition of employment agreed upon by the contracting parties and where not violative of any individual rights will be sustained. As to the issue whether this clause encourages or discourages membership in a union, this Court would conclude that the clause does not violate this provision of P.E.R.A. Nothing encompassed in the agency shop clause encourages anyone to do any more than contribute to the organization selected by a majority of the group to represent it. This contribution merely spreads among all the beneficiaries the cost of representation.

Third, plaintiffs contend that the provision here in question is violative of Section 353, Chapter LI, of the Michigan Penal Code, being MSA 28.585. This statute appears to this Court to be directed against unilateral acts by employers to relieve employees from arbitrary or capricious demands on the part of the employer. The agency shop clause in a collective bargaining agreement is not such a provision as would come within the purview of the criminal statute.

Fourth, the issue is raised whether this provision is contrary to or prohibited by the Michigan General School Laws. True it is that school boards derive their powers from the school laws and such other laws as may be applicable. It is urged that since the School Code does not authorize an agency shop agreement, the Board has no power to enter into one. This Court would hold that these statutes must be read in conjunction with P.E.R.A. Whether P.E.R.A. would invalidate such a provision has been dealt with supra. On this issue it would be indeed a narrow construction of the school laws to hold that nothing not specifically authorized therein is prohibited. Such a holding would be contrary to *Holland School District v. Holland Education Association*, 380 Mich. 314, and *Garden City School District Labor Mediation Board*, 358 Mich. 258.

From the foregoing it is patent that this Court would conclude that the agency shop provision is not repugnant to any statute or constitutional provision. Therefore, a Summary Judgment as prayed for by defendants will be granted. An appropriate Judgment in accordance with this Opinion may be presented.

/s/Charles Kaufman
Circuit Judge

Dated: January 19, 1970
Detroit, Michigan

A true Copy
EDGAR M. BRANIGIN
Clerk

**Opinion of the Circuit Court
for the
County of Wayne, Michigan,
dated November 5, 1973**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,

Plaintiffs,

-vs-

No. 145 080

THE BOARD OF EDUCATION OF THE
CITY OF DETROIT, DETROIT
FEDERATION OF TEACHERS, et al.,

Defendants.

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,

Plaintiffs,

-vs-

No. 155 255

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, et al.,

Defendants.

**OPINION RE: DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND PLAINTIFFS'
MOTION TO SUSPEND DUES DEDUCTIONS.**

These matters come before this Court on the plaintiffs' motion to suspend dues deductions and defendant's motion for summary judgment. Both these matters eventuate as a result of the Michigan State Supreme Court's decision in the case of *Smigel v Southgate School District*, 388 Mich 531. It appears that this aforementioned case had issues before the Supreme Court identical to the issues which this Court originally decided in the instant matters before this Court now.

It would appear that there is really only one issue before this Court at this time which will be dispositive of the entire controversy. That one issue is whether or not the Legislative Enactment 1973 PA 25 should be given retrospective effect or whether it should act only prospectively.

It appears that in the *Smigel* decision our Supreme Court in determining that the Public Employment Relations Act did not specifically provide for an agency shop, held that the agreement providing for same was contrary to the statute. If we look only to the words of the legislature in determining the legislative intent we find that the original act is silent as to an authorization for an agency shop. However, in looking at the amendment of the Public Employment Relations Act added by 1973 PA 25 there are clear and unequivocal words of intent of the legislature which indicate that the purpose of the amendatory act is to *reaffirm the continuing public policy of this state* that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to it a service fee which may be equivalent to

the amount of dues required by members. It would appear to this Court that in setting forth a public policy not only prospectively but also indicating it has always been the public policy of this state to make such a provision, that the legislature is indicating that while the Supreme Court may have correctly read the statute, as originally promulgated, the legislature is now making clear what it meant so that the effect of the Supreme Court's decision may be nullified. It should be noted here that it is the legislature which determines the public policy of a state and not a court.

This Court is at a loss to find any vested rights in the previous statute or in the decision of the Supreme Court redounding to the plaintiffs' benefit which would constitute a deprivation of any of their constitutional rights to have it now removed by the legislature. The defendants cite in their brief numerous instances where legislation may be retrospective. It will be unnecessary in this opinion to restate those cases or the points of law for which they stand.

This Court would hold that since the legislature specifically and validly indicated that it is reaffirming the continuing public policy of this State and inasmuch as this is an amendatory act, this Court would hold not only that the legislature intended retrospective application but that under all the circumstances pertaining to the matters now before the Court this is the only construction which squares with reality.

10a

A judgment in accordance with this opinion may be presented.

/s/Charles Kaufman
CHARLES KAUFMAN
Circuit Judge

November 5, 1973

A True Copy
Joseph B. Sullivan
Clerk

11a

**Opinion and Order of the
Court of Appeals
of the
State of Michigan**

**STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 1**

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,
Plaintiffs-Appellants,

v

Docket #19465

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF TEACHERS,
et al.,

Defendants-Appellees.

CHRISTINE WARCZAK, et al.,
Plaintiffs-Appellants,

v

Docket #19523

DETROIT BOARD OF EDUCATION,
et al.,

Defendants-Appellees.

BEFORE: McGregor, P.J., and J.H. Gillis and Quinn,
J.J.

PER CURIAM

Plaintiffs Christine Warczak and others, all Detroit teachers, filed a complaint for declaratory judgment on November 7, 1969, challenging the constitutional and statutory validity of the agency shop provision in the collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of

Teachers. Plaintiffs filed the cause of action on behalf of themselves and all others similarly situated. Named as defendants were the Detroit Board of Education, the Detroit Federation of Teachers and all teachers who are members of the Federation.

Defendants moved for summary judgment, which was granted on January 19, 1970 by the trial court. Plaintiffs appealed the grant of the summary judgment. The Michigan Supreme Court granted plaintiffs leave to appeal and set aside the summary judgment entered in favor of defendants, based on the decision in *Smigel v Southgate School District*, 388 Mich 531; 202 NW2d 305 (1972). The case was remanded to the circuit court "for further proceedings consonant herewith."

Thereafter, in the trial court, plaintiffs filed a motion for suspension of dues deduction authorizations. The defendants, on the other hand, filed a motion for summary judgment based on the then recent amendment to the Public Employment Relations Act authorizing agency shop provisions in collective bargaining agreements between public employers and public employees. MCLA 423.210; MSA 17.455(10).

The trial court granted defendants' motion for summary judgment and denied plaintiffs' motion to suspend dues deductions. In its opinion, the trial court stated that the amendment should be given retroactive effect. Plaintiffs appealed. On March 25, 1974, the Court of Appeals, on its own motion, entered an order consolidating this appeal with another pending appeal, *Abood et al v Detroit Board of Education, et al*.

In the *Abood* case, the complaint is essentially the same as that filed in the *Warczak* case, except that the named plaintiffs are more numerous and do not claim to represent any others than themselves. They also

allege that they have been threatened with dismissal and are requesting injunctive relief to restrain the enforcement of the agency shop clause. A motion for summary judgment was granted in favor of defendants in that case and plaintiffs appealed.

I

Should MCLA 423.210; MSA 17.455(10), effective June 14, 1973 and authorizing agency shop provisions in public employment contracts, be given retroactive effect so as to validate the agency shop provision in the contract entered into between the Detroit Federation of Teachers and the Detroit Board of Education?

In the *Smigel* case, *supra*, the Supreme Court of Michigan found that an agency shop provision in a contract between the Southgate Education Association and the Southgate Community School District was prohibited by §10 of the Public Employment Relations Act [PERA].

Justice T. M. Kavanagh pointed out in his opinion that there was a significant distinction in Michigan's labor law between public and private employees.

"Though MCLA 423.16; MSA 17.454(17) is nearly identical to MCLA 423.210; MSA 17.455(10) in respect to the requirement of employer neutrality, the statute regarding private

employment includes one very important provision which is not found in the public employment relations act. MCLA 423.14; MSA 17.454(15) constitutes an authorization of union security clauses whether in the form of 'closed shop', 'union shop' or 'agency shop.'" 388 Mich at 539-540; 202 NW2d at 306.

Since such an authorization was not included by the Legislature in the PERA, the Supreme Court concluded that the agency shop provision in Smigel was prohibited by the PERA.

This was the state of the law when the Abood and Warczak cases were remanded to the circuit court. Subsequently, however, the Legislature amended the PERA to provide:

"That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." MCLA 423.210; MSA 17.455 (10).

In the same section, the Legislature gave some indication of its intent in enacting the amendment.

"(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their

exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. MCLA 423.210; MSA 17.455(10).

In ruling that the amendment in question should be given retroactive application, the trial court stated that, by clear and unequivocal words of intent, the Legislature indicated its desire that the amendment be given such retroactive application. We respectfully disagree.

The most often-quoted statement of the law concerning retroactivity is found in *Detroit Trust Co. v Detroit*, 269 Mich 81, 84; 256 NW 811, 812-813 (1934):

"We think it is settled as a general rule in this State, as well as in other jurisdictions, that all statutes are prospective in their operation excepting in such cases as the contrary clearly appears from the context of the statute itself.

" "Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal and unavoidable implication from the words of the statute taken by

themselves and in connection with the subject matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention.” Endlich, *Interpretation of Statutes*, §271.” See also, *In re Davis' Estate*, 330 Mich 647, 650-651; 48 NW2d 151 (1951); *Briggs v Campbell, Wyant & Cannon*, 379 Mich 160, 164-165; 150 NW2d 752 (1967); *Olkowski v Aetna Casualty*, 53 Mich App 497, 503; 220 NW2d 97 (1974).

Considering “the occasion of the enactment” of the amendment, one might conclude that it should be given retroactive effect. However, as noted in *Detroit Trust Co, supra*, that is only one element. While that element may favor retroactivity, it is still necessary to consider the language of the amendment itself and to determine the Legislature’s intention.

The amendment in question states that its purpose is to “reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require * * * that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative.”

The Legislature’s use of the word “reaffirm” seems to indicate that it was their feeling that such was always the policy of this State. However, *Smigel* held to the contrary. That the Legislature felt that it had always been the public policy of this State to permit agency shop clauses in the public sector, and that it said so in the amendment, is not enough to overcome the presumption favoring prospective application of the amendment.

Therefore, it is our conclusion that the trial court erred in giving retroactive application to the amendment.

II

Does the agency shop clause violate plaintiffs' First and Fourteenth Amendment rights securing freedom of speech and freedom of association?

In *Railway Employees' Department v Hanson*, 351 US 225, 238; 76 S Ct 714, 721; 100 L Ed 1112, 1134 (1956), the Supreme Court considered the question whether a union shop agreement forces workers into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.

The Court held that “the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work * * * does not violate either the First or Fifth Amendments.” See also *Buckley v American Federation of Television & Radio Artists*, 496 F2d 305, 313 (1974).

However, the Court did not consider whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining. That issue was not presented in *Hanson*, but it is squarely before us in the case at bar.

MCLA 423.210; MSA 17.455(10) provides for “a service fee which may be equivalent to the amount of

dues uniformly required of members of the exclusive bargaining representative."

The political activities of labor unions are well-recognized. It is reasonable to assume that at least a portion of every union's budget goes to activities that could be termed political, e.g., support of candidates sympathetic to the union cause and lobbying for the passage of bills in the legislature. Since the amendment to MCLA 423.210; MSA 17.455(10) does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, it is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining.

In *International Association of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1964), the United States Supreme Court faced a situation that is nearly on all fours with the case at bar. *Street* involved the same provision of the Railway Labor Act which was considered in *Hanson*, *supra*. But in *Street* six employees brought action, on behalf of themselves and of employees similarly situated, alleging that the money each was thus compelled to pay to hold his job was in substantial part used to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed.

The Supreme Court did not pass directly on the constitutional issues, instead construing the statute to deny railroad unions the right, over the employee's objection, to use his money to support political causes which he opposes. Since the statute under consideration

here admits of no such construction, the constitutional issue requires decision.

We have before us then, two powerful countervailing public policies. We are asked, on the one hand, to preserve freedom of expression, and, on the other, to promote labor stability. But freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join. Justice Douglas expressed this concern well in his concurring opinion in *Street*:

"If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees." 367 US at 776; 81 S Ct at 1804; 6 L Ed 2d at 1165.

Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCLA 423.210; MSA 17.455(10) could violate plaintiffs' First and Fourteenth Amendment rights.

First, however, it should be noted that this is not a true class action. As the Supreme Court pointed out in *Street*, *supra*:

"Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object * * *. From these considerations, it follows that the present action is not a true class action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes." 367 US at 774; 81 S Ct at 1803; 6 L Ed 2d at 1164.

Thus it is that whatever relief is fashioned can only be applied to those Detroit teachers who have specifically protested the use of their funds for political purposes to which they object.

Further, the Supreme Court made it clear in *Street* that injunctive relief is not the proper remedy:

"Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." 367 US at 771; 81 S Ct at 1801; 6 L Ed 2d at 1162.

The Court suggested two possible remedies. 367 US at 774-775; 81 S Ct at 1803; 6 L Ed 2d at 1164-1165. The first is an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the total union budget.

The second method would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed. This is the method we prefer since, in each instance, the drawing up of a financial statement will be required to determine the proportion of union funds used for a particular purpose, and this method will least interfere with unions carrying out their daily functions.

To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.

In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore the plaintiffs are not entitled to relief on this basis.

The judgment of the lower court must be reversed, however, as to the retroactive application given to MCLA 423.210; MSA 17.455(10).

Reversed and remanded. No costs, a public question being involved.

APPENDIX B

Summary Judgment of the Circuit Court
for the
County of Wayne, Michigan,
dated January 23, 1970

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, et al.,

Plaintiffs, No. 145080

-vs-

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, MARY ELLEN RIOR-
DAN, JOHN ELLIOTT, MARILYN
KLEIN, EDWARD VANDERLAAN,
JOHN DOE and JANE DOE, as Teach-
ers and Employees of Detroit Board of
Education and Members of Detroit
Federation of Teachers,

Defendants.

SUMMARY
JUDGMENT
FOR
DEFENDANTS

At a session of said Court held in
the City-County Building in the City
of Detroit, Michigan on
January 23, 1970

PRESENT: HONORABLE CHARLES KAUFMAN,
CIRCUIT JUDGE.

This matter having come on to be heard upon the
motion of defendants for summary judgment in their

behalf pursuant to GCR 1963, 117.2(1), for the reason
that plaintiffs Christine Warczak, Ernest C. Smith,
Judith Kennedy, Bessie Petrone, LeRoy Rowley, Gerald
Golden, Yolanda Bone, Christine Nelson, Douglas L.
Roeseler, Diana M. Klawitter, Brenda C. Jett, Richard
R. Quick, James E. Davis, Leola R. Carter, Ethel B.
Beckwith, Richard J. Hendin, Arthur Schneider, El Vera
Gustafson, Harold C. Cook, Joseph A. Poniatowski,
Donald Ashby, Charles A. Benson, Edward Anthony,
Lillian Smith, Sara J. Cameron, Katherine A. Morrissey,
Noreene Leavell, Charles Kane, Margaret Quinn, Cataldo
Casiocchi, James L. Brennan, Marjorie N. Boone, Marjorie
H. Harrison, Sally K. Harrison, Cora McMillan, Dennis
G. Kelly, and George W. Carter have failed to state a
claim upon which relief can be granted, and defendant
Detroit Federation of Teachers and individual defend-
ants, by their counsel, and parties plaintiff and added
parties plaintiff, by their counsel, having filed briefs
in opposition thereto, and all counsel including counsel
for defendant Detroit Board of Education, having pre-
sented oral argument thereon; and the Court being fully
advised in the premises; now, therefore, for the reasons
more particularly set forth in the Opinion of the Court
dated January 19, 1970, on motion of counsel for
defendants;

IT IS ORDERED AND ADJUDGED, that plaintiffs
by their complaint and amended complaint have failed
to state a claim upon which relief can be granted; and

IT IS FURTHER ORDERED AND ADJUDGED that
the agency shop clause in the current collective
bargaining agreement between the defendant Detroit
Board of Education and defendant Detroit Federation
of Teachers is valid and of full force and effect
according to its terms; and

IT IS FURTHER ORDERED AND ADJUDGED that the said agency shop clause does not contravene the Constitution of the United States or of the State of Michigan or the statutes of the State of Michigan, including the Public Employment Relations Act, the Michigan Teachers Tenure Act, Section 353, Chapter LI, Penal Code (M.S.A. §28.585), and the Michigan school laws.

By consent of defendants, no costs are taxed, a public question being involved.

/s/Charles Kaufman
Circuit Judge

A True Copy
Edgar M. Branigan
Clerk

Order of the Supreme Court
of the
State of Michigan
dated December 28, 1972

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of December in the year of our Lord one thousand nine hundred and seventy-two.

| | |
|---|--|
| | Present the Honorable |
| WM 7-271 | THOMAS M. KAVANAGH, Chief Justice, |
| CHRISTINE | EUGENE F. BLACK, |
| WARCZAK, et al, | PAUL L. ADAMS, |
| Plaintiffs-Appellants, | THOMAS E. BRENNAN, |
| and | THOMAS G. KAVANAGH, |
| | JOHN B. SWAINSON, |
| ROBERT J. JOHNSON, G. MENNEN WILLIAMS, | Associate Justices |
| et al, | |
| | Intervening Plaintiffs- Appellants, |
| v | 53141 |
| DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS, et al, | |
| | Defendants-Appellees. |

On order of the Court (Black, J., not participating), leave to appeal is GRANTED. Pursuant to the decision in *Smigel et al, Plaintiffs-Appellees v Southgate Community School District et al, Defendants-Appellants*, Docket No. 53008, the summary judgment for the defendants entered in Wayne county circuit court on January 23, 1970, on order of Honorable Charles

Kaufman is hereby vacated and set aside and the cause is remanded to that court for further proceedings consonant herewith.

No costs. A public question.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of December in the year of our Lord one thousand nine hundred and seventy-two.

/s/ Harold Hoag
Deputy Clerk

**Summary Judgment of the Circuit Court
for the
County of Wayne, Michigan,
dated December 5, 1973**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,

No. 145 080

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE
CITY OF DETROIT, DETROIT
FEDERATION OF TEACHERS, et al.,
Defendants.

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,

No. 155 255

Plaintiffs,

vs.

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, et al.,

Defendants.

**SUMMARY
JUDGMENT
FOR
DEFENDANTS,
UPON
REMAND**

At a session of said Court held in the
City-County Building in the City of
Detroit, Michigan on
December 5, 1973

PRESENT: HONORABLE CHARLES KAUFMAN,
WAYNE CIRCUIT JUDGE.

These matters having come on to be heard on remand, following Order of the Michigan Supreme Court dated December 28, 1972 (in No. 145-080), on (1) motion of defendants for summary judgment in their behalf pursuant to GCR 1963, 117.2(1), for the reason that plaintiffs and added plaintiffs fail to state a claim upon which relief can be granted and (2) on plaintiffs' motion to suspend dues deductions, and the Court having heard arguments thereon, and having considered the briefs of counsel thereon, and the Court being fully advised in the premises, and having rendered its Opinion dated November 5, 1973, to which reference is made, now, therefore,

IT IS ORDERED AND ADJUDGED that 1973 PA 25 (immediately effective June 14, 1973), §§10(1)(c) Proviso and (2), specifically and validly, prospectively and retrospectively, authorizes agency shop agreements in public employment; and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs, by their complaint and amended complaint, have failed to state a claim upon which relief can be granted; and

IT IS FURTHER ORDERED AND ADJUDGED that the agency shop clause in the collective bargaining agreement between the defendant Detroit Board of Education and defendant Detroit Federation of Teachers is valid and of full force and effect according to its terms; and

IT IS FURTHER ORDERED AND ADJUDGED that said agency shop clause does not contravene the

Constitution of the United States or of the State of Michigan or the statutes of the State of Michigan.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion to suspend dues deductions is DENIED, for want of merit.

/s/Charles Kaufman
Wayne Circuit Judge

Approved as to form only:

/s/Charles E. Keller
Charles E. Keller

/s/Charles Fine
Charles Fine

A True Copy
Joseph B. Sullivan
Clerk

Order Denying Rehearing of the Circuit Court
for the
County of Wayne, Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,

Plaintiffs,

vs.

No. 145 080

THE BOARD OF EDUCATION OF THE
CITY OF DETROIT, DETROIT
FEDERATION OF TEACHERS,
et al.,

Defendants.

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,

Plaintiffs,

vs.

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, et al.,

Hon. Charles
Kaufman
P 15757

Defendants. Charles Keller
(for plaintiff)
P 15807

ORDER DENYING PLAINTIFFS'
MOTION FOR REHEARING

At a session of said Court held
in the City-County Building in the
City of Detroit, Michigan on
January 24, 1974

PRESENT: HONORABLE CHARLES KAUFMAN,
WAYNE CIRCUIT JUDGE.

This matter having come on to be heard on January 4, 1974, on plaintiffs' Motion For Rehearing of the Order Denying Motion to Suspend Dues Deduction and Granting the Defendants' Motion For Summary Judgment; and the parties having filed briefs for and in opposition to said motion; and the parties having presented oral arguments thereon in open Court on the record; and the Court being fully advised in the premises and having indicated its reasons and decision on the record, now, therefore,

IT IS ORDERED that said Motion be and the same is hereby DENIED.

/s/Charles Kaufman
Wayne Circuit Judge

A True Copy
Joseph B. Sullivan
Clerk

**Order Denying Rehearing of
the Court of Appeals
of the
State of Michigan**

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 15th day of May in the year of our Lord one thousand nine hundred and seventy-five.

| | |
|---|--|
| D. LOUIS ABOOD, MARY ACETI, JOYCE C. ALEXANDER, et al, Plaintiffs-Appellants | Present the Honorable LOUIS D. McGREGOR, Presiding Judge JOHN H. GILLIS, TIMOTHY C. QUINN, Judges |
| vs. | |
| DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS, et al, Defendants-Appellees | No. 19465 L.C. No. 155 255 |

| | |
|---|------------------|
| CHRISTINE WARCZAK, et al, Plaintiffs-Appellants | No. 19523 |
| vs. | |
| DETROIT BOARD OF EDUCATION, et al, Defendants-Appellees | L.C. No. 145 080 |

In this cause a motion for rehearing having been filed by appellants, and nothing in opposition thereto having been filed by appellees, and a motion for clarification

having been filed by appellees, and nothing in opposition thereto having been filed by appellants, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for rehearing and the motion for clarification shall be and the same are DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 15th day of May in the year of our Lord one thousand nine hundred and seventy-five.

/s/ Ronald L. Dzierbicki
Clerk

Orders of the Supreme Court
of the
State of Michigan
dated September 17, 1975

AT A SESSION OF THE SUPREME COURT OF THE
STATE OF MICHIGAN, Held at the Supreme Court
Room, in the City of Lansing, on the 17th day of
September in the year of our Lord one thousand nine
hundred and seventy-five.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER
Associate Justices

CR 15-83

D. LOUIS ABOOD, MARY
ACETI, JOYCE C.
ALEXANDER, et al,

Plaintiffs-Appellants
and Cross-Appellees.

v 57151 COA 19465
DETROIT BOARD OF LC 155 255
EDUCATION, DETROIT
FEDERATION OF
TEACHERS, et al,

Defendants-Appellees
and Cross-Appellants.

On order of the Court, the application for leave to
appeal by plaintiffs-appellants is considered and the
same is hereby DENIED because the appellants have
failed to persuade the Court that the questions
presented should be reviewed by this Court.

The application for leave to appeal by defendants-
cross-appellants is also considered and the same is
hereby DENIED because the cross-appellants have failed
to persuade the Court that the questions presented
should be reviewed by this Court.

Swainson, J., not participating.

STATE OF MICHIGAN ss.

I, Harold Hoag, Clerk of the Supreme Court of the
State of Michigan, do hereby certify that the foregoing
is a true and correct copy of an order entered in said
court in said cause; that I have compared the same with
the original, and that it is a true transcript therefrom,
and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the seal of said
Supreme Court at Lansing, this 17th day of
September in the year of our Lord one
thousand nine hundred and seventy-five.

/s/ Calvin R. Davis
Deputy Clerk

AT A SESSION OF THE SUPREME COURT OF THE
STATE OF MICHIGAN, Held at the Supreme Court
Room, in the City of Lansing, on the 17th day of
September in the year of our Lord one thousand nine
hundred and seventy-five.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER
Associate Justices

CR 15-83a

CHRISTINE WARCZAK,
ERNEST C. SMITH,
JUDITH KENNEDY,
AGNES STILLWELL, et al,

Plaintiffs-Appellants
and Cross Appellees.

v

57152

COA 19523

LC 145 080

THE BOARD OF
EDUCATION OF THE
CITY OF DETROIT,
DETROIT FEDERATION
OF TEACHERS, et al,

Defendants-Appellees
and Cross-Appellants.

On order of the Court, the application for leave to
appeal by plaintiffs-appellants is considered and the
same is hereby DENIED because the appellants have
failed to persuade the Court that the questions
presented should be reviewed by this Court.

The application for leave to appeal by defendants-
cross-appellants is also considered and the same is
hereby DENIED because the cross-appellants have failed
to persuade the Court that the questions presented
should be reviewed by this Court.

Swainson, J., not participating.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the
State of Michigan, do hereby certify that the foregoing
is a true and correct copy of an order entered in said
court in said cause; that I have compared the same with
the original, and that it is a true transcript therefrom,
and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the seal of said
Supreme Court at Lansing, this 17th day of
September in the year of our Lord one
thousand nine hundred and seventy-five.

/s/ Calvin R. Davis

Deputy Clerk

APPENDIX C

Notice of Appeal
 Filed in the Circuit Court
 for the
 County of Wayne, Michigan,
 on November 28, 1975

UNITED STATES OF AMERICA

IN THE SUPREME COURT

CHRISTINE WARCZAK, ERNEST C. Supreme Court
 SMITH, JUDITH KENNEDY, AGNES No. 571 52
 STILLWELL, et al.,

Plaintiffs-Appellants, Court of
 vs. Appeals

THE BOARD OF EDUCATION OF No. 19523
 THE CITY OF DETROIT, DETROIT

FEDERATION OF TEACHERS, et al., Wayne County
 Defendants-Appellees. Circuit Court
 No. 145 080

D. LOUIS ABOOD, MARY ACETI, Supreme Court
 JOYCE C. ALEXANDER, et al., No. 57151

Plaintiffs-Appellants,
 vs. Court of

THE BOARD OF EDUCATION OF Appeals
 THE CITY OF DETROIT, DETROIT No. 19465

FEDERATION OF TEACHERS, et al.,
 Defendants-Appellees. Wayne County
 Circuit Court
 No. 155 255

NOTICE OF APPEAL

Plaintiffs-Appellants in the above-referenced consolidated matter, Christine Warczak, et al., by and through their attorneys, Keller, Thoma, Toppin & Schwarze, P.C., hereby give notice to the Wayne County Circuit Court—the Court having possession of the record in this matter—of an appeal to the United States Supreme Court from the Order of the Michigan Supreme Court dated September 17, 1975 (denying Plaintiffs-Appellants' Application For Leave To Appeal) and from that portion of the Decision and Order of the Michigan Court of Appeals dated March 31, 1975 (from which Leave to Appeal was denied) which upheld the validity and constitutionality (on its face and as applied) of that portion of P.A. 1973 No. 25 providing for compulsory agency shop agreements in Michigan public employment. The Michigan Court of Appeals entered said Decision and Order when it reviewed the Opinion (dated November 5, 1973) and the Judgment (dated December 5, 1973) of the Wayne County Circuit Court in this matter.

The instant appeal to the United States Supreme Court is taken under 28 U.S.C. § 1257(2), since (a) the above-referenced matter draws into question the validity under the United States Constitution of a portion of a Michigan statute (P.A. 1972 No. 25), and (b) the above-referenced Decision and Order of the Michigan Court of Appeals constitutes a final decree in favor of

the validity of the portion of said statute being challenged by the highest Court of the State of Michigan from which a Judgment could be had.

Respectfully submitted,
KELLER, THOMA, TOPPIN &
SCHWARZE, P.C.

By: /s/ David E. Kempner
David E. Kempner (P23329)
Attorneys for Plaintiffs-Appellants
1600 City National Bank Building
Detroit, Michigan 48226
(313) 965-7610

Dated: November 28, 1975

APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

APPEAL DOCKETED FEBRUARY 13, 1976
PROBABLE JURISDICTION NOTED APRIL 26, 1976

(i)

INDEX TO APPENDIX*

| | Page |
|--|------|
| Chronological List of Relevant Docket Entries | 2 |
| <i>Warczak</i> Amended Complaint, Filed January 16, 1970 | 6 |
| <i>Warczak</i> Motion by Detroit Federation of Teachers, et al. for Summary Judgment, Filed November 12, 1969 | 16 |
| <i>Warczak</i> Answer and Motion for Summary Judgment, Filed December 23, 1969 | 17 |
| <i>Warczak</i> Plaintiffs' Offer of Proof, Filed January 12, 1970 | 21 |
| <i>Warczak</i> Affidavit of Charles A. Benson, Filed January 12, 1970 | 24 |
| <i>Warczak</i> Opinion of Wayne County Circuit Court, Filed January 19, 1970 | 29 |
| <i>Warczak</i> Summary Judgment for Defendants, Filed January 23, 1970 | 35 |
| <i>Warczak</i> Order Sustaining Objections by Defendant Detroit Federation of Teachers to Interrogatories to Defendant, Filed January 23, 1970 | 37 |
| <i>Abood</i> Complaint, Filed April 23, 1970 | 39 |
| <i>Abood</i> Answer of Defendants, Filed May 20, 1970 | 53 |
| <i>Warczak</i> Order of Michigan Supreme Court Vacating Summary Judgment and Remanding, Entered December 28, 1972 | 59 |
| <i>Warczak</i> Motion for Suspension of Dues Deduction Authorizations, Filed June 18, 1973 | 61 |
| <i>Warczak</i> Answer to Motion to Suspend Dues Deduction Authorizations, Filed July 5, 1973 | 66 |
| Motion of Defendants for Summary Judgment in Their Behalf, Filed July 5, 1973 | 68 |

*The parts of the record listed were filed in both *Abood* and *Warczak* unless otherwise indicated.

(ii)

| | <i>Page</i> |
|---|-------------|
| Answer to Motion of Defendants for Summary Judgment in Their Behalf, Filed July 13, 1973 | 69 |
| <i>Abood</i> Supplement and Amendment to Answer of Defendants, Filed July 13, 1973 | 70 |
| Wayne County Circuit Court's Opinion Re: Defendants' Motion for Summary Judgment and Plaintiffs' Motion to Suspend Dues Deduction, Filed November 7, 1973 | 72 |
| Summary Judgment for Defendants, Upon Remand, Filed December 5, 1973 | 75 |
| Wayne County Circuit Court's Order Denying Plaintiffs' Motion for Rehearing, Filed January 24, 1974 | 78 |
| Order of Michigan Court of Appeals Consolidating Appeals, Entered March 22, 1974 | 79 |
| Extracts from Brief in Support of Claim of Appeal, Filed April 11, 1974 | 80 |
| Opinion of the Michigan Court of Appeals, Entered March 31, 1975 | 94 |
| Order of Michigan Court of Appeals Reversing and Remanding, Entered March 31, 1975 | 104 |
| Application for Rehearing, Filed April 18, 1975 | 107 |
| Application for Rehearing or Clarification, Filed April 18, 1975 | 109 |
| Order of Michigan Court of Appeals Denying Applications for Rehearing and Clarification, Entered May 15, 1975 | 111 |
| Application for Leave to Appeal, Filed June 3, 1975 | 112 |
| Answer of Defendants-Appellees to Plaintiffs-Appellants' Application for Leave to Appeal, Filed July 7, 1975 | 118 |

(iii)

| | <i>Page</i> |
|---|-------------|
| Cross-Application by Defendants-Appellees for Leave to Appeal and for Peremptory or Summary Reversal, On Remand Issue, Only, Filed July 7, 1975 | 120 |
| Order of the Michigan Supreme Court Denying Application and Cross-Application for Leave to Appeal, Entered September 17, 1975 | 124 |

I
IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

CHRISTINE WARCZAK, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

APPENDIX

RELEVANT DOCKET ENTRIES*

Wayne County Circuit Court

- 11-7-69 Complaint filed. Summons issued. [Warczak]
 11-12-69 Motion by Det. Federation of Teachers et al for Summary Judgment & Notice of Hearing filed. [Warczak]
 12-23-69 Answer filed (Det. Bd. of Ed.), Mot. for Summary Jdmt. filed. [Warczak]
 1-12-70 Affidavits (6). [Warczak]
 1-12-70 Plaintiffs' Offer of Proof. [Warczak]
 1-13-70 Parties again present. Hearing concluded. Motion taken under advisement. Ct. sheet. C. Kaufman. [Warczak]
 1-16-70 Amended Complaint — filed. [Warczak]
 1-19-70 Opinion S & F C. Kaufman. [Warczak]
 1-23-70 Summary Judgment for Defts. S&F C. Kaufman. [Warczak]
 1-26-70 Motion to Amend the Decision and Order filed. [Warczak]
 1-30-70 Heard-Motion to amend decision denied. Ct. sheet. C. Kaufman. [Warczak]

Michigan Court of Appeals

- 2-2-70 Claim of Appeal [Warczak]

Wayne County Circuit Court

*Entries are for both *Abood* and *Warczak* unless otherwise indicated.

- 2-6-70 Order denying pltf's' motion to amend decision & order S&F C. Kaufman [Warczak]

- 4-23-70 Complaint filed. Summons issued. [Abood]

- 5-20-70 Answer filed (all). [Abood]

Michigan Supreme Court

- 12-1-70 Application filed by-pass [Warczak]

- 12-30-70 Opposition to application received and filed. [Warczak]

- 1-21-71 Ordered and held in abeyance pending 53008. Counsel granted leave to file amicus in 53008. [Warczak]

Michigan Court of Appeals

- 1-17-72 Order — held in abeyance pending decision by Supreme Court in *Smigel V Southgate Community School District* [Warczak]

Michigan Supreme Court

- 12-28-72 Granted — Circuit court order vacated and set aside, remanded for further proceedings. No costs. Record returned to circuit ct. [Warczak]

- 1-16-73 Motion for rehearing (reconsideration) filed. [Warczak]

- 2-7-73 Opposition to motion filed. [Warczak]

- 2-14-73 Motion denied [Warczak]

Wayne County Circuit Court

- 6-18-73 Notice of hearing and mot. for suspension of dues deduction authorizations and affidavit and memorandum brief in support thereof. [Warczak]

- 7-5-73 Answer to motion to suspend dues deduction authorizations filed. [Warczak]

- 7-5-73 Praecipe for Motion for Summary Judgment for Defendants.
- 7-13-73 Answer and Memorandum in opposition to Motion of Defendants for Summary Judgment in Their Behalf, filed.
- 7-13-73 Supplement & Amendment to Answer of Defendants filed. [Abood]
- 11-7-73 Opinion S/F C. Kaufman.
- 12-5-73 Summary judgment for defendants upon remand S/F C. Kaufman.
- 12-21-73 Motion for rehearing of order denying motion, etc, affidavit, brief, Notice of Hearing Filed, Proof of Service, Filed
- 12-28-73 Answer of defts in opposition to pltfs motion, etc, affidavit, Proof of Service, Filed
- 1-4-74 Motion for rehearing – heard & denied – ct. sheet C. Kaufman
- 1-15-74 Motion to settle order denying pltfs motion for rehearing, affidavit, Notice of Hearing Filed, Proof of Service, Filed
- 1-23-74 Motion re presentation of order heard & resolved – ct sheet C. Kaufman
- 1-24-74 Order denying pltfs motion for rehearing S/F C. Kaufman
- Michigan Court of Appeals**
- 2-11-74 Claim of Appeal
- 3-22-74 Order on Court's own motion consolidate 19523 & 19465
- 2-5-75 Case Heard
- 3-31-75 Opinion date
- 4-18-75 Motion for clarification by appellee; Application for rehearing by appellant
- 5-5-75 Answer to rehearing

- 5-15-75 Order deny application for rehearing; deny motion for clarification
Michigan Supreme Court
- 6-3-75 Appeal Filed.
Michigan Court of Appeals
- 6-10-75 Order – judgment reversed and remanded; no costs, public question*
Michigan Supreme Court
- 7-7-75 Answer and brief in opposition filed.
- 9-17-75 Application denied.
Wayne County Circuit Court
- 9-25-75 Notice [of Receipt of Record on Appeal from the Supreme Court], filed.
- 11-28-75 Notice [of Appeal to the United States Supreme Court], filed.

*Though the docket entry is 6-10-75, the order itself shows that it was entered on 3-31-75.

Warczak Amended Complaint
[Filed January 16, 1970]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.)
SMITH, JUDITH KENNEDY, BESSIE)
PETRONE, LeROY ROWLEY, GERALD)
GOLDEN, YOLANDA BONE, CHRIS-)
TINE NELSON, DOUGLAS L.)
ROESELER, DIANA M. KLAWITTER,)
BRENDA C. JETT, RICHARD R.)
QUICK, JAMES E. DAVIS, LEOLA R.)
CARTER, ETHEL B. BECKWITH,)
RICHARD J. HENDIN, ARTHUR)
SCHNEIDER, EL VERA GUSTAFSON,)
HAROLD C. COOK, JOSEPH A.) Case No.
PONIATOWSKI, DONALD ASHBY,) 145080
CHARLES A. BENSON, EDWARD)
ANTHONY, LILLIAN SMITH, SARA J.)
CAMERON, KATHERINE A. MOR-)
RISSEY, NOREENE LEAVELL,)
CHARLES KANE, MARGARET QUINN,)
CATALDO CASIECCI, JAMES L.)
BRENNAN, MARJORIE N. BOONE,)
MARJORIE H. HARRISON, SALLY K.)
HARRISON, CORA McMILLAN, DEN-)
NIS G. KELLY, and GEORGE W.)
CARTER,)

Plaintiffs,)

vs.)

DETROIT BOARD OF EDUCATION,)
DETROIT FEDERATION OF TEACH-)
ERS, MARY ELLEN RIORDAN, JOHN)
ELLIOTT, MARILYN KLEIN, EDWARD)
VANDERLAAN, JOHN DOE and JANE)
DOE, as Teachers and Employees of)
Detroit Board of Education and Members)
of Detroit Federation of Teachers.)

Defendants.)

AMENDED COMPLAINT

NOW COME the Plaintiffs, by their attorneys, Keller, Thoma, McManus & Keller, and pursuant to Michigan General Court Rule 521, file this Complaint and submit the following controversy for the Court's consideration for a declaration of rights and liabilities:

1. Plaintiffs are residents of Wayne County, Michigan, and are employed as teachers by Defendant Detroit Board of Education. Several of the Plaintiffs are probationary teachers, and the remaining Plaintiffs have continuing tenure under the Michigan Teacher Tenure Act, Act No. 4, P.A. 1937 (Ex. Sess.) as amended. Plaintiffs are members of a class so numerous as to make it impractical to bring them all before the Court and hence, in order to fairly insure the adequate representation of all the members of such class, Plaintiffs bring this action on their behalf since all of the members of such class are similarly situated and have common rights in the subject matter of this action.

2. Defendant Detroit Board of Education (hereinafter referred to as the "Board") is a body corporate operating the schools situated in the City of Detroit, Wayne County, Michigan, as a school district under the general school laws of the State of Michigan. It has its office and principal place of business in the City of Detroit, Wayne County, Michigan.

3. Defendant Detroit Federation of Teachers (hereinafter referred to as the "Federation") is a labor organization having as its membership teachers employed by Defendant Board. It has its offices in the City of Detroit, Wayne County, Michigan.

4. Defendant Mary Ellen Riordan is a teacher and Employee of Defendant Detroit Board of Education and President of Defendant Detroit Federation of Teachers.

5. Defendant John Elliott is a teacher and Employee of Defendant Detroit Board of Education and first Vice President of Defendant Detroit Federation of Teachers.

6. Defendant Marilyn Klein is a teacher and Employee of Defendant Detroit Board of Education and Secretary of Defendant Detroit Federation of Teachers.

7. Defendant Edward Vanderlaan is a teacher and Employee of Defendant Detroit Board of Education and Treasurer of Defendant Detroit Federation of Teachers.

8. That Defendants John Doe and Jane Doe, whose names are unknown but whose persons are well known, are teachers and employees of Defendant Detroit Board of Education and members of Defendant Detroit Federation of Teachers. That said Defendants are representatives of a class of people so numerous as to make it impracticable to otherwise bring them all before this Court. The question involved is one of common and general interest and through the persons named as Defendants in this action, the issue here involved can be fairly tried and the rights of members of said class can be adjudicated by decrees of this Court, all as more specifically set forth in G.C.R. 208.1.

9. Effective July 1, 1969, and for the period ending July 1, 1971, Defendant Board and Defendant Federation entered into a collective bargaining agreement, embracing the salaries, hours, and other terms and conditions of employment of said teachers,

including Plaintiffs and all members of the class represented by Plaintiffs, which provides, among other things, in a clause entitled "Union Membership, Agency Shop, and Dues Deduction", as follows:

A. All employees, employed in the bargaining unit, or who become employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members. This provision is effective Monday, January 26, 1970.

B. The Board, upon receiving a signed statement from the Union indicating that the employee has failed to comply with this condition, shall immediately notify said employee that his services shall be discontinued at the end of the current semester, and shall dismiss said employee accordingly. The Board shall follow the dismissal procedure of the Michigan Tenure Act as applicable. The refusal of a teacher to contribute fairly to the costs of negotiation and administration of this and subsequent agreements is recognized as just and reasonable cause for termination of employment under the Michigan Tenure Act. However if at the end of the semester, a teacher, or teachers, receiving the termination notice shall then be engaged in pursuing any legal remedies contesting the discharge under this provision

before the Michigan Tenure Commission, or a court of competent jurisdiction, such teacher's service shall not be terminated until such time as such teacher or teachers have either obtained a final decision as to the validity or legality of such discharge, or such teacher or teachers have ceased to pursue the legal remedies available to them by not making a timely appeal of any decision rendered in said manner by the Tenure Commission, or a court of competent jurisdiction.

C. An employee who shall tender or authorize the deduction of membership dues (or service fees) uniformly required as a condition of acquiring or obtaining membership in the union, shall be deemed to meet the conditions of this Article so long as the employee is not more than sixty (60) days in arrears of payment of such dues (or fees).

D. The Board shall be notified, in writing, by the Union of any employee who is sixty (60) days in arrears in payment of membership dues (or fees).

E. If any provision of this Article is invalid under Federal or State law, said provision shall be modified to comply with the requirements of said Federal or State law.

F. The Union agrees that in the event of litigation against the Board, its agents or employees arising out of this provision, the Union will co-defend and indemnify and hold harmless the Board, its agents or employees for any monetary award arising out of such litigation.

G. Each employee in the bargaining unit shall execute an authorization for the deduction of Union dues or Agency Shop fees.

H. The Board shall deduct from the pay of each employee from whom it receives an authorization to do

so the required amount for the payment of Union dues or Agency Shop fees. Such dues or fees, accompanied by a list of employees from whom they have been deducted and the amount deducted from each, and by a list of employees who had authorized such deductions and from whom no deduction was made and the reason therefor, shall be forwarded to the Union office no later than thirty (30) days after such deductions were made.

10. Plaintiffs aver that it is the intention of the Defendants to compel Plaintiffs, and all members of the class represented by Plaintiffs, to comply with the provisions of the so-called "Union Membership, Agency Shop, and Dues Deduction" clause (hereinafter referred to as the "Agency Shop Clause") quoted above, namely, pay to Defendant Federation each month the regular monthly union membership dues or service fees equivalent thereto, and in default of payment thereof, to dismiss Plaintiffs and all teachers similarly situated from their employment.

11. Plaintiffs and other teachers similarly situated are unwilling to pay and have refused to pay said regular monthly union membership dues or service fees equivalent thereto to Defendant Federation.

12. Plaintiffs aver that Defendant Federation, under its constitution and by-laws and its policies and practices, discriminates in favor of members and to the disadvantage of non-members, with a view to inducing and encouraging membership in the Federation in the following respects:

A. Only members are allowed to attend and vote at business meetings, including meetings for the ratification of collective bargaining contracts, of the Federation. The privilege of voting and/or holding elective office in the Federation is extended only to members in good standing. In short, non-members have no voice of any kind in the affairs of the Federation.

B. The Federation carries on various social activities for the benefit of its members which are not available to non-members as a matter of right.

13. Defendant Federation is affiliated with the Michigan Federation of Teachers, a labor organization having as its members teachers throughout the State of Michigan, and with the American Federation of Teachers, a labor organization having as its members teachers throughout the United States, and other labor organizations. Said labor organizations, including Defendant Federation, are engaged, in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.

14. Plaintiffs aver that collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs, among such disadvantages being the following:

A. Strikes called, sponsored and encouraged in violation of law.

B. Deprivation of individual choice in relation to many job prerequisites and privileges.

C. Loss of earnings on a long-term basis.

D. Damage suffered by individuals by reason of intra-union rivalries and inefficiency and corruption within unions.

WHEREFORE, since an actual controversy exists between Plaintiffs and members of the class represented by Plaintiffs and the Defendants herein with respect to the validity and enforceability of said Agency Shop Clause, Plaintiffs respectfully pray:

1. That the Court determine and declare the rights and other legal relationships of the parties hereto with respect to the premises.

2. That the Court determine and declare said Agency Shop Clause, and the requirements thereof, are void and of no effect, and are contrary to the provisions of the Constitution of the United States and the State of Michigan, and to the statutes of the State of Michigan, *inter alia*, in that

A. The requirement of the payment by Plaintiffs and other teachers similarly situated of compulsory union membership dues or service fees deprives them of their right to freedom of association, freedom from association, freedom of thought, and their right to privacy contrary to the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and their penumbras, to the Constitution of the United States and Article I of the Constitution of the State of Michigan, 1963.

B. The requirement of the payment by Plaintiffs and other teachers similarly situated of compulsory union membership dues or service fees deprives them of their right to work and of their liberty and property without due process of law and denies to them the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States

and Article I of the Constitution of the State of Michigan, 1963.

C. That Plaintiffs are deprived of their constitutional rights and privileges, as set forth in subsection A and B, by further reasons that Defendant Federation is affiliated with the Michigan Federation of Teachers and other labor organizations. Said labor organizations, including Defendant Federation, are engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.

D. Said Agency Shop Clause is contrary to the provisions of the Public Employment Relations Act, Act 336, Public Acts of Michigan of 1947, as amended, including in particular, Section 10(c) thereof, which forbids discrimination in regard to hire, or terms and conditions in order to encourage membership in a labor organization.

E. Said Agency Shop Clause is also contrary to (1) The Michigan Teacher Tenure Act, Act No. 4, Public Acts of Michigan of 1937 (Ex. Sess.), as amended; (2) Section 353, Chapter LI, Penal Code of Michigan, M.S.A. 28.585; and (3) the Michigan General School Laws.

3. That the Court grant to Plaintiffs and members of the class represented by Plaintiffs such further and other relief as may be necessary, or may to the Court seem just and equitable, in the premises.

Respectfully submitted,
KELLER, THOMA, MC MANUS
& KELLER

BY /s/ Leonard A. Keller

Leonard A. Keller
Attorneys for Plaintiffs
2366 Penobscot Building
Detroit, Michigan 48226
313-965-7610

DATED: Detroit, Michigan
January 16, 1970

**Warczak Motion by Detroit Federation of
Teachers for Summary Judgment**
[Filed November 12, 1969]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**MOTION BY DETROIT FEDERATION OF
TEACHERS, ET AL. FOR
SUMMARY JUDGMENT**

Now come defendants, Detroit Federation of Teachers, Mary Ellen Riordan, John Elliott, Marilyn Klein, and Edward Vanderlaan, by their attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, and move for summary judgment in their behalf for the following reasons and grounds:

Plaintiffs have failed to state a claim upon which relief can be granted.

WHEREFORE, said defendants pray that summary judgment be entered in their behalf.

ROTHE, MARSTON, MAZEY,
SACHS & O'CONNELL
by /s/ Theodore Sachs

Theodore Sachs
Attorneys for defendants DFT et al.
1000 E. Farmer
Detroit, Michigan 48226
965-3464

DATED: November 12, 1969

Warczak Answer and Motion for Summary Judgment
[Filed December 23, 1969]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**ANSWER AND MOTION FOR
SUMMARY JUDGMENT**

Now comes THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, a statutory body corporate, (hereinafter called "Defendant") one of the defendants in the above-entitled cause, by its attorneys, Miller, Canfield, Paddock and Stone, and makes answer to the complaint of CHRISTINE WARCZAK, ERNEST C. SMITH, JUDITH KENNEDY, AGNES STILLWELL, et al by saying:

1. Not having sufficient information upon which to form a belief, Defendant neither admits nor denies the allegations contained in paragraph 1 of plaintiffs' complaint, but leaves plaintiffs to their proofs.
2. Defendant admits the allegations of paragraph 2 of plaintiffs' complaint.
3. Defendant admits the allegations of paragraph 3 of plaintiffs' complaint.
4. Defendant admits the allegations of paragraph 4 of plaintiffs' complaint.
5. Defendant admits the allegations of paragraph 6 of plaintiffs' complaint.
6. Defendant admits the allegations of paragraph 6 of plaintiffs' complaint.

7. Defendant admits the allegations of paragraph 7 of plaintiffs' complaint.

8. Not having sufficient information upon which to form a belief, defendant neither admits nor denies the allegations contained in paragraph 8 of plaintiffs' complaint, but leaves plaintiffs to their proofs.

9. Defendant admits the allegations of paragraph 9 of plaintiffs' complaint.

10. In answer to the allegations of paragraph 10 of the plaintiffs' complaint, defendant asserts that it is the intention of the Board of Education of the School District of the City of Detroit to comply with all provisions of its collective bargaining agreement with the Detroit Federation of Teachers, including the clause referred to. As to any other allegations of said paragraph 10, the collective bargaining contract speaks for itself.

11. Not having sufficient information upon which to form a belief, defendant neither admits nor denies the allegations contained in paragraph 11 of plaintiff's complaint, but leaves plaintiffs to their proofs.

12. Defendant denies the allegations of paragraph 12 and avers and alleges that the allegations of said paragraph 12 are allegations of law and not of fact.

WHEREFORE, defendant prays that this Honorable Court enter its judgment of no cause for action in favor of defendant The Board of Education of the School

District of the City of Detroit, a school district of the first class, and against plaintiffs.

Miller, Canfield, Paddock and Stone

By /s/ George E. Bushnell, Jr.

George E. Bushnell, Jr.

And /s/ Carl H. von Ende

Carl H. von Ende

Attorneys for Defendant The Board of
Education of the School District
of the City of Detroit

2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
963-6420

Dated: December 23, 1969

MOTION FOR SUMMARY JUDGMENT

Now Comes THE BOARD OF EDUCATION OF
THE SCHOOL DISTRICT OF THE CITY OF
DETROIT, a school district of the first class, defendant

herein, and respectfully moves this Honorable Court, under the provisions of Rule 117, Michigan General Court Rules, for summary judgment in its favor on the grounds that the plaintiffs have failed to state a claim upon which relief can be granted.

Miller, Canfield, Paddock and Stone
By /s/ George E. Bushnell, Jr.

George E. Bushnell, Jr.

And /s/ Carl H. von Ende
Carl H. von Ende

Attorneys for Defendant The Board of
Education of the School District
of the City of Detroit
2500 Detroit Bank & Trust Building
Detroit, Michigan 48226
963-6420

Dated: December 23, 1969

Warczak Plaintiffs' Offer of Proof
[Filed January 12, 1970]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

PLAINTIFFS' OFFER OF PROOF

Plaintiffs offer to show on the trial of this cause by competent witnesses, testifying on the basis of personal knowledge and/or qualified expert opinion, and through the testimony of officers and representatives of Defendant Federation and its affiliated organizations, and the books, documents and records of such organizations that:

A. Collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to plaintiffs, and that the advantages of collective bargaining do not, in any case, justify the deprivation of the constitutional rights of individuals.

Plaintiffs will show that among such disadvantages are the following:

1. Strikes called, sponsored and encouraged in violation of law.
2. Deprivation of individual choice in relation to many job prerequisites and privileges.
3. Loss of earnings on a long-term basis.

4. Damage suffered by individuals by reason of intra-union rivalries and inefficiency and corruption within unions.

B. Defendant Federation is affiliated with the Michigan Federation of Teachers, a labor organization having as its members teachers throughout the State of Michigan, and with the American Federation of Teachers, a labor organization having as its members teachers throughout the United States, and other labor organizations. Said labor organizations, including Defendant Federation, are engaged, plaintiffs are informed and therefore aver, in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which plaintiffs do not approve, and in which they will have no voice, and that a substantial part of the sums required to be paid under said agency shop clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.

C. Defendant Federation, under its constitution and by-laws and its policies and practices, discriminates in favor of members and to the disadvantage of non-members, with a view to inducing and encouraging membership in the Federation in the following respects:

1. Only members are allowed to attend and vote at business meetings, including meetings for the ratification of collective bargaining contracts, of the Federation. The privilege of voting and/or holding elective office in the Federation is extended only to members in good standing. In short, non-members

have no voice of any kind in the affairs of the Federation.

2. The Federation carries on various social activities for the benefit of its members which are not available to non-members as a matter of right.

Dated: January 12, 1970.

Respectfully submitted,

KELLER, THOMA, McMANUS &
KELLER

By /s/ Leonard A. Keller

Leonard A. Keller
Attorneys for Plaintiffs
2366 Penobscot Building
Detroit, Michigan 48226
Telephone: 965-7610

Warczak Affidavit of Charles A. Benson
[Filed January 12, 1970]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF WAYNE)

CHARLES A. BENSON, being duly sworn, depose and say that I am one of the Plaintiffs in the above-entitled cause and make this Affidavit for the purpose of preventing the entry of a summary judgment against me in said cause; that all facts set forth herein are within my personal knowledge; that I am not disqualified from being a witness, and that if sworn as a witness I can testify competently to the facts hereinafter set forth.

I am opposed to the clause entitled "Union Membership, Agency Shop and Dues Deduction" presently contained in the collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers, and I am unwilling to comply therewith. If I am compelled to pay agency shop service fees to the Detroit Federation of Teachers, I feel that I will be deprived thereby of my constitutional rights in that:

1. The Detroit Federation of Teachers is affiliated with other labor organizations, including the Michigan

Federation of Teachers and the American Federation of Teachers. It is also affiliated with other labor unions having nothing to do with the profession of teaching, through its membership in the AFL-CIO, and the other unions which are members of that association.

2. Directly, and through its affiliated organizations named above, a substantial portion of the revenues of the Detroit Federation of Teachers is devoted to political and social purposes of which I do not necessarily approve. I am unwilling to pay agency shop dues to support such activities and purposes over which I will have no control. Some of such activities which have come to my attention, either by word of mouth from other teachers, or from the publications of the Detroit Federation of Teachers, are as follows:

A. Support of political candidates for public office, including those which are partisan in nature, such as state offices and the U.S. Congress, and others which are non-partisan in nature, such as offices in the city of Detroit, membership on the Detroit Board of Education, and judicial offices. In some cases, this has meant that the Federation has supported candidates selected and recommended by outside political agencies, such as the Committee on Political Education (COPE), which is the political arm of the AFL-CIO.

B. In addition to supporting candidates for various political offices, the Federation uses its funds to promote legislation, both on the state level, through the Michigan Federation of Teachers, which has an office in Lansing, and on the national level through the American Federation of Teachers, which has its office in Washington, D.C. In both cases, I am informed, they take positions and lobby with respect

to legislation favored by the unions. Also, on the purely local level, the Detroit Federation of Teachers supports measures to be adopted by the Detroit Board of Education on issues of public and social importance. For example, the Federation supported the so-called "moratorium day" which was a nationwide protest against the war in Vietnam. It has also taken positions with respect to such issues as aid to parochial schools, re-structuring of the Detroit city school system, and related issues.

As a teacher who is not a member of the Detroit Federation of Teachers, I am opposed to the use of union funds for these political and social purposes. It is my position that any funds collected from teachers by a union should be expended for only one purpose, namely, collective bargaining on behalf of the teachers in the system. This means to me that the Federation should devote all of its funds to the improvement of teachers' salaries and working conditions in Detroit.

3. Further, I disagree with the Federation when it (and the Board of Education) insists that all teachers, even non-members, should share the cost of collective bargaining, not because I think collective bargaining is wholly disadvantageous, but because I believe that it should be left to the individual to decide whether or not he desires to support an organization which bargains on his behalf. Specifically, while collective bargaining may be of advantage to teachers in Detroit in certain economic aspects, such as salaries, it is also, in part, detrimental to the interests of the profession as a whole and to individual teachers in other aspects.

A. I do not believe that teachers should strike in violation of law. Yet the Detroit Federation of Teachers has struck in the past and doubtless will

threaten to strike in the future. It is the official policy of the American Federation of Teachers to endorse teachers' strikes and to work for the removal of legislation prohibiting strikes. Strikes by teachers are on the increase. I think this is detrimental to the teaching profession, and will in time also impose an economic hardship on many teachers who are forced to remain out of work during a strike, against their will. In addition, teachers' strikes, as endorsed by the Federation, are highly detrimental to education, the community as a whole, and the children in the public schools.

B. I also believe that collective bargaining has numerous disadvantages for individual teachers. In many instances, the seniority principle, rather than individual merit, will control assignments, placements, promotions in some instances, and other rewards for professional skill and competence. Individuals are not able to make personal decisions and agreements with principals and other administrators which they deem beneficial to themselves or the best interests of the profession and to students.

C. I am opposed to compulsory payment of service fees because of the internal political rivalries which are common in unions and exist in the Federation.

4. Lastly, I oppose the compulsory payment of service fees to the Federation because, under its constitution and by-laws and its policies and practices, the Federation discriminates in favor of members and to the disadvantage of non-members, with a view to inducing and encouraging membership in the Federation in the following respects:

A. Only members are allowed to attend and vote at business meetings, including meetings for the ratification of collective bargaining contracts, of the Federation. The privilege of voting and/or holding elective office in the Federation is extended only to members in good standing. In short, non-members have no voice of any kind in the affairs of the Federation.

B. The Federation carries on various social activities for the benefit of its members which are not available to non-members as a matter of right.

Attached to this Affidavit are copies of various publications issued or published by the Federation, including articles from The Detroit Teacher, the official publication of the Federation, all of which are in the possession of defendants.

/s/ Charles A. Benson

[Jurat omitted in printing.]

[Attachments omitted in printing.]

Warczak Opinion of Wayne County Circuit Court
[Filed January 19, 1970]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF
THE SCHOOL DISTRICT OF THE
CITY OF DETROIT, a statutory
body corporate; DETROIT
FEDERATION OF TEACHERS;
MARY ELLEN RIORDAN; JOHN
ELLIOTT; et al.,

Civil Action
No. 145080

Defendants.

OPINION

This matter comes before this Court on defendants' (Detroit Federation of Teachers and Detroit Board of Education) Motion for Summary Judgment under Michigan General Court Rule 117, predicated on the claim that plaintiffs have failed to state a cause of action. Specifically the plaintiffs claim that they are entitled to declaratory relief to determine the validity of the agency shop clause in the collective bargaining agreement between the defendant Detroit Board of Education and defendant Detroit Federation of Teachers.

Plaintiffs filed this suit as a class action on behalf of themselves and others in a similar situation who are also school teachers who object to the requirement that they authorize deduction of service fees equal to the regular union dues or be terminated from employment. It appears that defendant Detroit Federation of Teachers have been certified as the exclusive bargaining representative of all teachers in the Detroit School System by virtue of the application of the procedures set forth in the Public Employment Relations Act.

The complaint filed by plaintiffs contends that the agency shop clause as it appears in the collective bargaining agreement is invalid as to these plaintiffs and all others in the same class for the following reasons:

1. This provision violates the constitutional guarantees of freedom of association and right to privacy.
2. It denies plaintiffs due process and equal protection as required by both State and Federal Constitutions.
3. Use of collected monies for purposes other than that germane to the contract itself is illegal as to them.
4. The clause is contrary to state statutes; namely, the Public Employment Relations Act, Michigan Teachers Tenure Act, Section 353, Chapter LI, Penal Code (MSA 28.585), and the Michigan General School Laws.

In regard to the question of freedom of association and right to privacy, it should be noted that the provision for an agency shop does not require plaintiffs or any of them to become members or join the defendant union. It does require that all persons

covered by the contract contribute an equal sum to the union designated as the bargaining agent for all the employees.

Plaintiffs contend that the provision in the collective bargaining agreement deprives them of certain guarantees under the due process clause. Nowhere can this Court find any arbitrary or discriminatory provisions in the principle of the agency shop clause. No employee will be prejudiced in or be deprived of his employment without the safeguards of due process. The contract itself provides for the following of the dismissal procedure of the Michigan Tenure Act which requires notices, hearing, representation, confrontation and a written record. On the issue as to whether the plaintiffs are being denied equal protection as guaranteed by the constitution, it does not appear that any employee in the bargaining unit is being in any manner discriminated against whether or not he is a union member. Each employee has all the rights and privileges of a member and all the protections and benefits guaranteed to members. He pays no more (or less) than a member for the services rendered to him.

Plaintiffs' contention that the use of the monies collected for purposes other than that germane to the bargaining and administration of the contract would be illegal as to them is a somewhat novel issue. It does not appear to have had much consideration by courts. One case touching upon it is *I.A.M. v. Street*, 367 U.S. 740, where, as a matter of statutory construction, the court held that the monies could not be used for certain purposes, but even in this case the Supreme Court held an injunction to restrain the collection was not to be permitted. To the same effect is the case of *Railroad*

Clerks v. Allen, 373 U.S. 113, wherein the case was returned to the trial court to determine the proportion of the dues used for improper purposes.

In the instant proceeding it does not appear that this is really an issue at this juncture. The matter before this Court is for declaratory relief from the enforcement of the particular clause. No money has been used for any purposes as yet, the authority appears to be that a restraining of the collection is not the proper remedy and in this context there may be an issue to be resolved in a proper proceeding as to what expenditure of the funds is proper. Perhaps in a suitable proceeding it may be decided that any expenditure in furtherance of legitimate union purposes may be permissible.

Finally, it is necessary to determine whether the agency shop clause in the agreement is contrary to or prohibited by any state statute. First, plaintiffs call this Court's attention to the Michigan Tenure Act which provides for discharge or demotion of a tenure teacher only for reasonable and just cause. Can this be reconciled with the agency shop clause which requires the dismissal of a teacher for failure to pay the service fee equivalent to the regular union dues? A reading of the contract will reveal that the constitutional safeguards of procedural due process as required by the Michigan Tenure Act be followed. If not against public policy and repugnant to any basic rights of individuals, it is most conceivable that this violation of the collective bargaining contract may justify discharge. The cases are myriad in holding that where the agency shop clause is violated an employee's discharge for violation of the clause was reasonable.

Secondly, plaintiffs call this Court's attention to the P.E.R.A. itself and contend that the agency shop clause is prohibited in that it is not specifically authorized. A comparison of P.E.R.A. with M.L.M.A. indicates that M.L.M.A. specifically authorizes it, P.E.R.A. is silent and therefore plaintiffs would contend that it is an indication that the legislature intended to provide for no form of union security in public employment contracts. This Court would conclude the contrary. P.E.R.A. authorizes contracts between employees and their public employers to cover conditions of employment. The agency shop is apparently a condition of employment agreed upon by the contracting parties and where not violative of any individual rights will be sustained. As to the issue whether this clause encourages or discourages membership in a union, this Court would conclude that the clause does not violate this provision of P.E.R.A. Nothing encompassed in the agency shop clause encourages anyone to do any more than contribute to the organization selected by a majority of the group to represent it. This contribution merely spreads among all the beneficiaries the cost of representation.

Third, plaintiffs contend that the provision here in question is violative of Section 353, Chapter LI, of the Michigan Penal Code, being MSA 28.585. This statute appears to this Court to be directed against unilateral acts by employers to relieve employees from arbitrary or capricious demands on the part of the employer. The agency shop clause in a collective bargaining agreement is not such a provision as would come within the purview of the criminal statute.

Fourth, the issue is raised whether this provision is contrary to or prohibited by the Michigan General School Laws. True it is that school boards derive their powers from the school laws and such other laws as may be applicable. It is urged that since the School Code does not authorize an agency shop agreement, the Board has no power to enter into one. This Court would hold that these statutes must be read in conjunction with P.E.R.A. Whether P.E.R.A. would invalidate such a provision has been dealt with supra. On this issue it would be indeed a narrow construction of the school laws to hold that nothing not specifically authorized therein is prohibited. Such a holding would be contrary to *Holland School District v. Holland Education Association*, 380 Mich. 314, and *Garden City School District Labor Mediation Board*, 358 Mich. 258.

From the foregoing it is patent that this Court would conclude that the agency shop provision is not repugnant to any statute or constitutional provision. Therefore, a Summary Judgment as prayed for by defendants will be granted. An appropriate Judgment in accordance with this Opinion may be presented.

/s/ Charles Kaufman
Circuit Judge

Dated: January 19, 1970
Detroit, Michigan

A TRUE COPY
EDGAR M. BRANIGIN
CLERK

BY /s/
Deputy Clerk

Warczak Summary Judgment for Defendants
[Filed January 23, 1970]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, et al.,
Plaintiffs, No. 145080

-vs-

DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS, MARY ELLEN RIORDAN, JOHN ELLIOTT, MARILYN KLEIN, EDWARD VANDERLAAN, JOHN DOE and JANE DOE, as Teachers and Employees of Detroit Board of Education and Members of Detroit Federation of Teachers,
Defendants.

SUMMARY
JUDGMENT
FOR
DEFENDANTS

At a session of said Court held in
the City-County Building in the City
of Detroit, Michigan on
JAN 23 1970

PRESENT: HONORABLE CHARLES KAUFMAN,
CIRCUIT JUDGE.

This matter having come on to be heard upon the motion of defendants for summary judgment in their behalf pursuant to GCR 1963, 117.2(1), for the reason that plaintiffs Christine Warczak, Ernest C. Smith, Judith Kennedy, Bessie Petrone, LeRoy Rowley, Gerald

Golden, Yolanda Bone, Christine Nelson, Douglas L. Roeseler, Diana M. Klawitter, Brenda C. Jett, Richard R. Quick, James E. Davis, Leola R. Carter, Ethel B. Beckwith, Richard J. Hendin, Arthur Schneider, El Vera Gustafson, Harold C. Cook, Joseph A. Poniatowski, Donald Ashby, Charles A. Benson, Edward Anthony, Lillian Smith, Sara J. Cameron, Katherine A. Morrissey, Noreene Leavell, Charles Kane, Margaret Quinn, Cataldo Casiecci, James L. Brennan, Marjorie N. Boone, Marjorie H. Harrison, Sally K. Harrison, Cora McMillan, Dennis G. Kelly, and George W. Carter have failed to state a claim upon which relief can be granted, and defendant Detroit Federation of Teachers and individual defendants, by their counsel, and parties plaintiff and added parties plaintiff, by their counsel, having filed briefs in opposition thereto, and all counsel including counsel for defendant Detroit Board of Education, having presented oral argument thereon; and the Court being fully advised in the premises; now, therefore, for the reasons more particularly set forth in the Opinion of the Court dated January 19, 1970, on motion of counsel for defendants;

IT IS ORDERED AND ADJUDGED, that plaintiffs by their complaint and amended complaint have failed to state a claim upon which relief can be granted; and

IT IS FURTHER ORDERED AND ADJUDGED that the agency shop clause in the current collective bargaining agreement between the defendant Detroit Board of Education and defendant Detroit Federation of Teachers is valid and of full force and effect according to its terms; and

IT IS FURTHER ORDERED AND ADJUDGED that the said agency shop clause does not contravene the

Constitution of the United States or of the State of Michigan or the statutes of the State of Michigan, including the Public Employment Relations Act, the Michigan Teachers Tenure Act, Section 353, Chapter LI, Penal Code (M.S.A. §28.585), and the Michigan school laws.

By consent of defendants, no costs are taxed, a public question being involved.

/s/ CHARLES KAUFMAN

CIRCUIT JUDGE

A TRUE COPY
EDGAR M. BRANIGAN
CLERK

BY /s/ _____
Deputy Clerk

**Warczak Order Sustaining Objections of
Defendant Detroit Federation of Teachers
to Interrogatories to Defendant
[Filed January 23, 1970]**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

ORDER SUSTAINING OBJECTIONS BY
DEFENDANT DETROIT FEDERATION
OF TEACHERS TO INTERROGATORIES
TO DEFENDANT

At a session of said Court held
in the City-County Building in the
City of Detroit, Michigan on
JAN 23 1970

PRESENT: HONORABLE CHARLES KAUFMAN,
CIRCUIT JUDGE.

This matter having come on to be heard on the objections by Detroit Federation of Teachers to Interrogatories to Defendant theretofore filed by added parties plaintiff; and defendant Detroit Federation of Teachers, by its counsel, having been heard in support of said objections, and the plaintiffs and added plaintiffs, by their attorneys, having been heard in opposition thereto; and the Court being fully advised in the premises; now, therefore, on motion of Rothe, Marston, Mazey, Sachs & O'Connell,

IT IS ORDERED that said objections to interrogatories be and the same are hereby sustained, for the reason that said interrogatories are not relevant to the matters in issue and before the Court, under the defendants' motion for summary judgment for failure of plaintiffs to state a claim upon which relief can be founded, and under the complaint and amended complaint for declaratory relief.

/s/ CHARLES KAUFMAN

CIRCUIT JUDGE

[Clerk's certificate omitted in printing.]

Abood Complaint
[Filed April 23, 1970]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

D. Louis Abood, Mary Aceti, Joyce C.)
Alexander, Mary. E. Allen, Roy A. Allen,)
Jr., Mrs. Aurelia Amnatte, Theodore J.)
Anchell, Martin Astourian, Fred Atiyeh,)
Sylvia Baia, Irene Balas, Antoinette)
Balazy, Walter Banks, Florence Barham,)
Nina Berry, Harry Beusterien, Marion)
Bezou, Francis Bickel, Toby Bistrow,)
Frances Blomfield, Carl Blumfield, Kath-)
leen Boeltcher, Peter Bogart, Ruby)
Branch, Velma Brewer, Bertha Brotman,)
Mary Buelick, Beatrice Burlage, Anna)
Burnett, Matthew Burrer, Chester)
Bustraen, Albert Butler, Mary Butler,)
John Butterfield, Paul Bergman, Fred)
Bies, Wesley Carlos, Nicholas Canton,)
Ward Carlson, Marcia Carpenter, Julia)
Carr, Dorothy Chimney, Truman Cleve-)
land, Eleanor Coate, Charlotte Cody,)
Marcile Cohen, Robert Cohen, Vivian)
Collins, Grace Colter, Levy Conerway,)
Minnie Conley, Michelle Cook, Helen)
Corders, Frederic Cosgro, Jr., Lois Creed,)
Earl Croll, Larry Crosby, Margaret Cully,)
Pauline Curtis, Emil Dalak, Pamela Darust,)
Lucille Davenport, Estelle Davidson,)
Morlean Daye, Ernest Deason, Mary)
Deason, Henry Dees, Euphrasia DeRonne,)
R. Allegra Desser, Arthur Devers, Susan)
Dickow, Daniel Dobbins, John Donaldson,)

Helen Douglass, Edward Drew, Elaine)
 Easton, Diego Enciso, Helen Enlow,)
 Richard Eshkanian, Cora Eubanks, Linda)
 Engenio, James Evans, Marguerite Faber,)
 Frances Fahrenbacher, Vernon Fahren-)
 krug, James Faust, Helen Fenton, Cinna)
 Ferguson, Max Fertel, Barbara Foreman,)
 Gloria Fort, Melvin France, Janet)
 Franczek, Gerald Frasier, Harriette Frayer,)
 Karen Friess, Felix Galasso, Edna)
 Gamrath, Nina Gates, Joseph Giglio,)
 Robert Gialloredo, Michael Gilin, Elaine)
 Gilman, Richard Gold, Rita Gold, Elaine)
 Goodman, Terese Gostomski, Patricia)
 Grant, Howard Green, Leslie Greenwald,)
 Peggy Grimshaw, Ernest Grinine, Angelo)
 Gust, S. Gerald Gorcyca, Margaret Grossa,)
 C. Halliday, Chloris Harmsen, Fred Harris,)
 Albert Hart, Lawrence Harwin, William)
 Hass, Mary Hassett, Bettye Hayden,)
 Josephine Hayden, Eunice Hayes, Kenneth)
 Hency, Elizabeth Hennes, Marsha Hewitt,)
 Edith Hicks, Jacquelyn Hilisman, Howard)
 Hiss, C. Holliday, Harris Hool, Jeffernell)
 Howcott, S. Howell, Frank Huxley,)
 Louise Irwin, Steve Jackson, Mary James,)
 Roger Jamison, Anna Jefferson, Charles)
 Jenks, Diane Johnson, Jurate Joksa, James)
 Jones, Nancy Kaufman, Shirley Kehn,)
 Harry Keller, Darrell Kincade, Fred)
 Knack, John Knox, Ann Kohut, Myrra)
 Koppin, Edward Kroll, Kathleen)
 Krumpoch, Mary Kulis, Edward Kupsoff,)
 Arthur Kuzniar, Elizabeth Larkins, Jewel)
 Laurence, Helene Lawler, Verda Lawler,)
 Virginia Leonard, Norma Littlejohn, Vir-)
 ginia Lloyd, Letitia Loosli, Dorothy)
 Lochbihler, Letitia Loosli, Henry Luns-)
 ford, Ralph MacPherson, X. Maguire,)

Ruth Martin, Goldie Martinez, Eugenie)
 Maxwell, Mary McCarthy, Violet)
 McCreery, Gary McGaffey, Mildred)
 McGill, Jack McGrath, Preston McKee,)
 Rebecca McNamee, Gertrude Mentli-)
 kowski, Mrs. Victor Merdler, John Miller,)
 Lila Miller, Roy Morgan, Leah Moir,)
 Curtis Moore, Maurice Morger, V.)
 Muszczynska, Augie Myers, Orion)
 Nazzaro, Judith Nearhood, Elizabeth)
 Neeb, Jo Ann Neff, James Newby, David)
 Newman, Pauline Nicholson, Morris)
 Norkin, Gloria Nycek, Joyce O'Brien,)
 William O'Brien, Jr., Joseph Olson, Philip)
 Owen, Robert Owens, Mark Palombo,)
 Elaine Palombo, Elizabeth Pattison,)
 Beatrice Paul, Edwena Payne, Emma)
 Pearson, Barbara Pedersen, John Perry,)
 Lynne Pfannef, James Polk, Norma)
 Potter, Joseph Powers, Thomas Powers,)
 Lorene Quinlan, Dorothy Reardon, Nancy)
 Reckinger, Dorothy Reece, Charles Reed,)
 Donald Reegle, Margaret Reesedge, June)
 Richard, Roosevelt Richards, P. Ritchie,)
 Pearl Roberson, Margaret Robertson,)
 Robert Roehl, Alvin Rolle, Mary Ross,)
 Andrew Roth, Harry Russell, Otto)
 Salchow, Donette Sayles, Eleanor)
 Schaedel, Edna Schiller, Rolyn Schindler,)
 Norville Schock, Robert Schwartz,)
 Angelica Semenjuk, Mae Sepp, Leslie)
 Seppala, Beth Shafe, Fred Shafe, James)
 Sharpe, Johnny Shepard, Charles Shires,)
 Gus Shuras, Arthur Siegel, Ralph Sigel,)
 Monica Sims, Edward Silberstein, Ruth)
 Sinnhuber, Irene Sipe, Joan Slowik,)
 Arnold Smith, Allen Smith, Beatrice)
 Smith, Donald Smith, Frank C. Smith.)

Frank R. Smith, Mary Smith, Olga Smith,)
 Stanley Stankovich, Michael Stanton,)
 Florence Starr, Phyllis Stengel, Justine)
 Stevens, Roy Stevens, Letha Steward,)
 Richard Stocker, Herman Strate, Willie)
 Straughter, Russell Swartz, Robert)
 Swearingen, Hedwig Taylor, Patricia)
 Taylor, Elaine Teague, Wilfred Thierry,)
 Winnie Thierry, W. Thompson, Carroll)
 Thurston, Shirley Tillman, Pauline Tomke,)
 Neil Troutman, William Van Fleet, Mae)
 Veldhuis, Lillian Verreau, Constance)
 Vinson, Wilbur Walters, George Wartian,)
 Diane Weinstein, Blanche Weiss, Edwina)
 Weiss, Donald Westlake, Ucola White,)
 Barbara Williams, Joan Wills, Edward)
 Wirth, Harriet Wojtowicz, Myrna Work-)
 man, James Wright, Beverly Wydra, Lois)
 Yates, Sarah Young, M. Lee Youngs,)
 Helen Zavis,)

Plaintiffs,)

vs.)

Detroit Board of Education, Detroit)
 Federation of Teachers, Mary Ellen)
 Riordan, John Elliott, Marilyn Klein, Paul)
 Richards,)

Defendants.)

COMPLAINT

NOW COMES Plaintiffs, by and through their attorneys, Keller, Thoma, Mc Manus & Keller and say as follows:

COUNT I

1. Plaintiffs are employed as teachers by Defendant, Detroit Board of Education. Several of the Plaintiffs are probationary teachers, and the remaining Plaintiffs have continuing tenure under the Michigan Teacher Tenure Act, Act No. 4, P.A. 1937 (Ex. Sess.) as amended.

2. Defendant Detroit Board of Education (hereinafter referred to as the "Board") is a body corporate operating the schools situated in the City of Detroit, Wayne County, Michigan, as a school district under the general school laws of the State of Michigan. It has its office and principal place of business in the City of Detroit, Wayne County, Michigan.

3. Defendant Detroit Federation of Teachers (hereinafter referred to as the "Federation") is a labor organization having as its membership teachers employed by Defendant Board. It has its offices in the City of Detroit, Wayne County, Michigan.

4. Defendant Mary Ellen Riordan is a teacher and Employee of Defendant Detroit Board of Education and President of Defendant Detroit Federation of Teachers.

5. Defendant John Elliott is a teacher and Employee of Defendant Detroit Board of Education and first Vice President of Defendant Detroit Federation of Teachers.

6. Defendant Marilyn S. Klein is a teacher and Employee of Defendant Board of Education and Secretary of Defendant Detroit Federation of Teachers.

7. Defendant Paul Richards is a teacher and Employee of Defendant Detroit Board of Education and Treasurer of Defendant Detroit Federation of Teachers.

8. Effective July 1, 1969, and for the period ending July 1, 1971, Defendant Board and Defendant

Federation entered into a collective bargaining agreement, embracing the salaries, hours, and other terms and conditions of employment of said teachers, including Plaintiffs, which provides, among other things, in a clause entitled "Union Membership, Agency Shop, and Dues Deduction", hereafter referred to as the "Agency Shop Clause", as follows:

A. All employees, employed in the bargaining unit, or who become employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members. This provision is effective Monday, January 26, 1970.

B. The Board, upon receiving a signed statement from the Union indicating that the employee has failed to comply with this condition, shall immediately notify said employee that his services shall be discontinued at the end of the current semester, and shall dismiss said employee accordingly. The Board shall follow the dismissal procedure of the Michigan Tenure Act as applicable. The refusal of a teacher to contribute fairly to the costs of negotiation and administration of this and subsequent agreements is recognized as just and reasonable cause for termination of employment under the Michigan Tenure Act. However if at the end of the

semester, a teacher, or teachers, receiving the termination notice shall then be engaged in pursuing any legal remedies contesting the discharge under this provision before the Michigan Tenure Commission, or a court of competent jurisdiction, such teacher's service shall not be terminated until such time as such teacher or teachers have either obtained a final decision as to the validity or legality of such discharge, or such teacher or teachers have ceased to pursue the legal remedies available to them by not making a timely appeal of any decision rendered in said manner by the Tenure Commission, or a court of competent jurisdiction.

C. An employee who shall tender or authorize the deduction of membership dues (or service fees) uniformly required as a condition of acquiring or obtaining membership in the union, shall be deemed to meet the conditions of this Article so long as the employee is not more than sixty (60) days in arrears of payment of such dues (or fees).

D. The Board shall be notified, in writing, by the Union of any employee who is sixty (60) days in arrears in payment of membership dues (or fees).

E. If any provision of this Article is invalid under Federal or State law, said provision shall be modified to comply with the requirements of said Federal or State law.

F. The Union agrees that in the event of litigation against the Board, its agents or employees arising out of this provision, the Union will co-defend and indemnify and hold harmless the Board, its agents or employees for any monetary award arising out of such litigation.

G. Each employee in the bargaining unit shall execute an authorization for the deduction of Union dues or Agency Shop fees.

H. The Board shall deduct from the pay of each employee from whom it receives an authorization to do so the required amount for the payment of Union dues or Agency Shop fees. Such dues or fees, accompanied by a list of employees from whom they have been deducted and the amount deducted from each, and by a list of employees who had authorized such deductions and from whom no deductions was made and the reason therefor, shall be forwarded to the Union office no later than thirty (30) days after such deductions were made.

9. Plaintiffs have not become members of Defendant Detroit Federation of Teachers and have refused to authorize a dues deduction or pay said regular monthly union membership dues, or service fees equivalent thereto, to Defendant Federation.

10. On November 7, 1969, a class action suit (hereinafter "the class action suit") was instituted in Wayne County Circuit Court on behalf of Plaintiffs and other teachers similarly situated alleging the invalidity of the "Agency Shop" provision here before set forth, said suit being Civil Action Case No. 145080 and is now pending before the Michigan Court of Appeals, being Docket No. 8951.

11. On or about February 11, 1970, and again on or about March 25, 1970, Defendant Detroit Board of Education was notified that Plaintiffs are members of the above class action suit.

12. Notwithstanding the pendency of the above class action suit in the Michigan Court of Appeals, on April 3, 1970 Defendant Federation requested Defendant Detroit Board of Education to immediately notify Plaintiffs that their services were to be discontinued at

the end of the current semester and that the Board in fact discharge Plaintiffs.

13. Notwithstanding the notification identifying Plaintiffs as members of the class action suit and notwithstanding the pendency of said suit in the Michigan Court of Appeals, Defendant Detroit Board of Education on or about March 17, 1970 and again on April 8, 1970, in compliance with Defendant Federation's request, have threatened Plaintiffs with discharge.

14. Plaintiffs aver that because of Defendant Detroit Board of Education's repeated threats of discharge, they are fearful that they will in fact be discharged at the conclusion of the current school semester, ending July 1, 1970, in violation of the aforementioned "agency shop" provision prohibiting discharge if teachers are pursuing legal remedies contesting the validity of the agency shop clause.

15. Plaintiffs aver that unless Defendant Detroit Board of Education is restrained, it will carry out its threat and discharge the Plaintiffs in mass, resulting in immediate irreparable injury and loss not only to Plaintiffs but also to the families of Plaintiffs, the children attending public schools, in the City of Detroit, and the parents of said children.

WHEREFORE, Plaintiffs pray:

1. That this Honorable Court issue a temporary injunction against the Defendants, enjoining said Defendant from discharging Plaintiffs pursuant to the agency shop clause of the collective bargaining agreement pending final decision of the class action suit.

2. That the Court grant to Plaintiffs such further and other relief as may be necessary, or may to the Court seem just and equitable.

COUNT II

1. Plaintiffs incorporate by reference the allegations contained in Paragraph 1 through 9 of Count I, inclusive, as if said allegations were set forth herein, in their entirety.

2. Plaintiffs aver that it is the intention of Defendants to compel Plaintiffs to comply with the provisions of the so-called "agency shop clause", quoted above, namely, pay to Defendant Federation each month the regular monthly union membership dues or service fees equivalent thereto, and in default of payment thereof, to dismiss Plaintiffs from their employment.

3. Plaintiffs aver that Defendant Federation, under its constitution and by-laws and its policies and practices, discriminates in favor of members and to the disadvantage of non-members, with a view to inducing and encouraging membership in the Federation in the following respects:

A. Only members are allowed to attend and vote at business meetings, including meetings for the ratification of collective bargaining contracts, of the Federation. The privilege of voting and/or holding elective office in the Federation is extended only to members in good standing. In short, non-members have no voice of any kind in the affairs of the Federation.

B. The Federation carries on various social activities for the benefit of its members which are not available to non-members as a matter of right.

4. Plaintiffs aver that Defendant Federation is affiliated with the Michigan Federation of Teachers, a labor organization having as its members teachers

throughout the State of Michigan, and with the American Federation of Teachers, a labor organization having as its members teachers throughout the United States. Said labor organizations, including Defendant Federation, are engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board, and that a substantial part of the sums required to be paid under said agency shop clause are used and will continue to be used for the support of such activities and programs, and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board.

5. Plaintiffs aver that collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs, among such disadvantages being the following:

A. Strikes called, sponsored and encouraged in violation of law.

B. Deprivation of individual choice in relation to many job prerequisites and privileges.

C. Loss of earnings on a long-term basis.

D. Damage suffered by individuals by reason of intra-union rivalries and inefficiency and corruption within unions.

6. Plaintiffs aver that said agency shop clause and requirements thereof are void and of no effect, and are

contrary to the provisions of the constitution of the United States and State of Michigan, *inter alia*, in that

A. The requirement of the payment by Plaintiffs of compulsory union membership dues or service fees deprives them of their right to freedom of association, freedom from association, freedom of thought, and their right to privacy contrary to the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and their penumbras, to the Constitution of the United States and Article I of the Constitution of the State of Michigan, 1963.

B. The requirement of the payment by Plaintiffs of compulsory union membership dues or service fees deprives them of their right to work and of their liberty and property without due process of law and denies to them the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Michigan, 1963.

7. Plaintiffs aver that said agency shop clause and the requirements thereof are contrary to the provisions of Michigan statutes, including (1) the Public Employment Relations Act, Act 336, Public Acts of Michigan of 1947, as amended; (2) the Michigan Teacher Tenure Act, Act No. 4 P.A. of Michigan, 1937 (Ex. Sess.), as amended; (3) Section 353, Chapter LI, Penal Code of Michigan, M.S.A. 28.585; and (4) the Michigan General School Laws.

WHEREFORE, Plaintiffs pray:

1. That this Honorable Court issue a temporary injunction against the Defendants, enjoining said Defendants from discharging Plaintiffs pursuant to the agency shop clause of the collective bargaining agreement pending a final decision of this cause.

2. That upon final hearing in this cause, the Court issue a permanent injunction enjoining said Defendants from discharging Plaintiffs pursuant to the agency shop clause of the collective bargaining agreement.

3. That this Court grant to Plaintiffs such further and other relief as may be necessary, or may to the Court seem just and equitable.

COUNT III

1. Plaintiffs incorporate by reference each and every allegation contained in Count I, as if said allegations were set forth herein, in their entirety.

WHEREFORE, Plaintiffs pray:

1. That this Honorable Court grant to Plaintiffs and against Defendants a declaratory judgment declaring that each of Plaintiffs is a member of the class of Plaintiffs in the class action suit and is thereby engaged in pursuing a legal remedy contesting a discharge under and as provided by Paragraph B of the agency shop clause.

2. That none of the Plaintiffs herein may be discharged by Defendant Board of Education under Paragraph B of the agency shop clause until after a final and unappealable disposition has been made of the class action suit.

COUNT IV

1. Plaintiffs incorporate by reference each and every allegation contained in Count II, as if said allegations were set forth herein, in their entirety.

WHEREFORE, Plaintiffs pray:

1. That this Honorable Court grant to Plaintiffs and against Defendants a declaratory judgment declaring that

A. Defendants may not discharge Plaintiffs under Paragraph B of the agency shop clause.

B. Defendants *may not* as a condition to the tenure and continued employment of Defendant Board of Education, require that Plaintiffs pay dues or a service fee to Defendant Federation.

Respectfully submitted,

KELLER, THOMA, MC MANUS
& KELLER

BY /s/ Thomas H. Schwarze

Thomas H. Schwarze
Attorneys for Plaintiffs
2366 Penobscot Building
Detroit, Michigan 48226
313-965-7610

DATED: Detroit, Michigan
April 23, 1970

Aboud Answer of Defendants
[Filed May 20, 1970]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

ANSWER OF DEFENDANTS

Now come Detroit Board of Education, Detroit Federation of Teachers, Mary Ellen Riordan, John Elliott, Marilyn Klein and Paul Richards, defendants herein, by their attorneys, Rothe, Marston, Mazey, Sachs & O'Connell, and in answer to plaintiffs' complaint, say:

COUNT I.

1. Answering paragraph 1, defendants admit the allegations therein, on information and belief, except that certain of said persons are not within the teachers' bargaining unit.

2. Answering paragraph 2, defendants admit the allegations therein.

3. Answering paragraph 3, defendants admit the allegations therein.

4. Answering paragraph 4, defendants admit the allegations therein.

5. Answering paragraph 5, the defendants admit the allegations therein.

6. Answering paragraph 6, defendants admit the allegations therein.

7. Answering paragraph 7, defendants admit the allegations therein.

8. Answering paragraph 8, defendants admit the same except that such clause, being Article I, Section C of the said agreement, is captioned "Union Membership, Dues or Agency Shop Service Fees" (not "Union Membership, Agency Shop, and Dues Deduction"), the paragraphs thereof are numbered 1-8, inclusive (not "A" through "H"), and the word "service" appears after "Agency Shop" in "G" [7] and "H" [8].

9. Answering paragraph 9, defendants neither admit nor deny the allegations therein, defendants not having, within the time required to prepare the instant answer, sufficient information on which to base a belief, and therefore leave plaintiffs to their proofs; except, however, that defendants assert that at least 101 persons listed as plaintiffs herein are members of the Defendant Federation, or are paying agency shop fees.

10. Answering paragraph 10, defendants admit the allegations therein, except they deny that same was a class action.

11. Answering paragraph 11, defendants deny the allegations therein in the form and manner pleaded, except that defendant Board, on or about the date stated, received notice of said claim, which was then and is now denied.

12. Answering paragraph 12, defendants deny said allegations, except defendants admit that defendant Federation sent defendant Board a list of those employees who had failed to comply with Article I, Section C of the Agreement, and requested dismissal of said persons, as required by said Article I, Section C; defendants neither admit nor deny that certain of the

plaintiffs may be upon said list, not having sufficient information on which to base a belief, and therefore leave plaintiffs to their proofs.

13. Answering paragraph 13, defendants deny the allegations therein in the form and manner pleaded, except that defendant Board on or about the date stated, in compliance with defendant Federation's request as stated in the foregoing paragraph, and in accordance with the parties' collective bargaining agreement, advised persons on said list, which may include certain of the plaintiffs, that they would be discharged under the appropriate section of the contract in the event of non-compliance therewith.

14. Answering paragraph 14, defendants deny the conclusion that defendant Board's apprehended action is improper.

15. Answering paragraph 15, defendants deny said allegations, the same being contrary to fact.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted; and there is no genuine issue as to any material fact.

2. Plaintiffs fail to state a claim upon which relief can be granted; and there is no genuine issue as to any material fact. *Inter alia*, the Detroit Board of Education and the Detroit Federation of Teachers concur that plaintiffs did not comply with the agency shop and "legal remedies" provisions of the contract between the Detroit Board of Education and the Detroit Federation of Teachers.

3. Plaintiffs lack standing to enforce the collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers.

4. Plaintiffs have failed to exhaust remedies under the contract between Detroit Board of Education and the Detroit Federation of Teachers.

5. Under plaintiffs' complaint, they are splitting a cause of action.

6. Under plaintiffs' complaint, the Court is without jurisdiction in the premises.

WHEREFORE, defendants pray for dismissal of said count, with costs to defendants.

COUNT II.

1. Defendants incorporate herein, by reference, their answer to paragraphs 1-9, inclusive, of Count I hereof.

2. Answering paragraph 2, defendants admit the allegations of said paragraph.

3. Answering paragraph 3, defendant Board neither admits nor denies the allegations therein, not having sufficient information on which to base a belief, and therefore leaves plaintiffs to their proofs. Defendant Federation denies said allegations, except only to admit that membership which is uniformly available without discrimination as to all employees of the defendant Board in the teachers' bargaining unit, including plaintiffs, is a condition of the rights and responsibilities of membership, including voting, office holding, liability for assessments, obligations of membership, etc.

4. Answering paragraph 4, defendant Board neither admits nor denies the allegations therein, not having

sufficient information on which to base a belief, and therefore, leaves plaintiffs to their proofs. Defendant Federation denies said allegations except that it admits that it is affiliated with the Michigan Federation of Teachers, a labor organization having as its members teachers throughout the State of Michigan, and with the American Federation of Teachers, a labor organization having as its members teachers throughout the United States. Defendant Federation denies that any part of the sums required to be paid under the agency shop clause are used or will be used, directly or indirectly, for any purpose not germane to its collective bargaining activities.

5. Answering paragraph 5, defendants deny the allegations therein, as contrary to fact and law.

6. Answering paragraph 6, defendants deny the allegations therein, as contrary to fact and law.

7. Answering paragraph 7, defendants deny the allegations therein, as contrary to fact and law.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted.

2. Under plaintiffs' complaint, they are splitting a cause of action.

3. Under plaintiffs' complaint, the Court is without jurisdiction in the premises.

4. If plaintiffs are part of the alleged plaintiff class in Warczak et al. v. Detroit Board of Education et al., No. 145-080, then the Summary Judgment against plaintiffs therein is res judicata against the plaintiffs herein.

WHEREFORE, defendants pray for dismissal of said complaint, with costs to defendants.

COUNT III

1. Defendants incorporate by reference their answer and affirmative defenses contained in Count I hereof.

WHEREFORE, defendants pray for dismissal of said complaint, with costs to defendants.

COUNT IV.

1. Defendants incorporate by reference their answer and affirmative defenses contained in Count II hereof.

WHEREFORE, defendants pray for dismissal of said complaint with costs to defendants.

ROTHE, MARSTON, MAZEY,
SACHS & O'CONNELL

by /s/ Theodore Sachs
Theodore Sachs
Attorneys for defendants
1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: May 18, 1970.

**Warczak Order of Michigan Supreme Court
Vacating Summary Judgment and Remanding
[Entered December 28, 1972]**

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of December in the year of our Lord one thousand nine hundred and seventy-two.

| | |
|---|--|
| WM 7-271 | Present the Honorable THOMAS M. KAVANAGH, Chief Justice, |
| CHRISTINE WARCZAK, et al, Plaintiffs-Appellants, and | EUGENE F. BLACK, PAUL L. ADAMS, THOMAS E. BRENNAN, THOMAS G. KAVANAGH, JOHN B. SWAINSON, |
| ROBERT J. JOHNSON, et al, | G. MENNEN WILLIAMS, Associate Justices |
| | Intervening Plaintiffs- Appellants, |
| v 53141 | |
| DETROIT BOARD OF EDUCATION, DETROIT FEDERATION OF TEACHERS, et al, | Defendants-Appellees. |

On order of the Court (Black, J., not participating), leave to appeal is GRANTED. Pursuant to the decision in *Smigel et al*, Plaintiffs-Appellees v *Southgate Community School District et al*, Defendants-Appellants, Docket No. 53008, the summary judgment for the defendants entered in Wayne county circuit

court on January 23, 1970, on order of Honorable Charles Kaufman is hereby vacated and set aside and the cause is remanded to that court for further proceedings consonant herewith.

No costs. A public question.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court of Lansing, this 29th day of December in the year of our Lord one thousand nine hundred and seventy-two.

/s/ Harold Hoag

Deputy Clerk

**Warczak Motion for Suspension of
Dues Deduction Authorizations
[Filed June 18, 1973]**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**MOTION FOR SUSPENSION OF DUES
DEDUCTION AUTHORIZATIONS**

Now come the plaintiffs by their attorneys and move this Honorable Court for an order declaring that check-off authorizations heretofore executed by employees of defendant Board of Education of the City of Detroit authorizing said defendant to deduct union dues and fees from wages of said employees and to pay over the moneys so deducted to defendant Detroit Federation of Teachers, be suspended and terminated. In support of such motion plaintiffs state as follows:

1. Defendants have heretofore entered into a collective bargaining agreement containing a compulsory agency shop clause under which plaintiffs and other employees of defendant Board of Education were required as a condition of employment to either join the union or pay to the union each month an agency fee equivalent in amount to the regular monthly union membership dues paid by teachers who are members of the union. The compulsory agency shop clause became effective January 26, 1970, and further provided that the refusal of any teacher to contribute the required

dues would be recognized as just and reasonable cause for termination of such teacher's employment within 60 days after notification from the union to their employer.

2. The compulsory agency fee agreement further provided that "Each employee in the bargaining unit shall execute an authorization for the deduction of Union dues or Agency Shop fees." Pursuant to this clause hundreds of teachers were induced and coerced into executing such check-off authorizations under threat of loss of their employment.

3. The amended complaint filed herein on January 16, 1970, requested this Court to declare the compulsory agency shop clause invalid for the various grounds stated therein. On January 19, 1970, the Court issued an opinion and order holding the compulsory agency shop clause valid under the Michigan Public Employment Relations Act, and granting summary judgment to defendants. An appeal from such order was duly noted by plaintiffs, and defendants filed a motion with the Michigan Supreme Court requesting that the case be heard on a by-pass appeal from the Michigan Court of Appeals.

4. On December 29, 1971, the Supreme Court of Michigan entered the following Order in this case: (Copy attached as Appendix A hereto)

"On order of the Court (Black, J., not participating), leave to appeal is GRANTED. Pursuant to the decision in *Smigel et al*, Plaintiffs-Appellees v. *Southgate Community School District et al*, Defendants-Appellants, Docket No. 53008, the summary judgment for the defendants entered in Wayne county circuit court on January 23, 1970, on order of Honorable Charles Kaufman is hereby

vacated and set aside and the cause is remanded to that court for further proceedings consonant herewith.

No costs. A public question."

5. A motion for rehearing by defendants was denied by order of the Supreme Court of Michigan entered February 14, 1973, as follows: (Copy attached as Appendix B hereto)

"On order of the Court, the "Motion for Rehearing" is considered, and the same is hereby DENIED for the reason that defendants and appellees have failed to establish that this Court's order of December 28, 1972 was erroneously entered."

6. Plaintiffs are informed and believe that under duress of the compulsory agency shop agreement entered into by defendants a large number of employees of defendant Board of Education executed union membership applications or agency fee dues deduction authorizations and that these employees have never been given notification of their right to revoke such authorizations following the decision of the Supreme Court of Michigan in *Smigel et al v. Southgate Board of Education* declaring compulsory agency shop agreements invalid and unenforceable under the Public Employment Relations Act. As a result, many such employees, who are involuntary union members or agency fee payers, continue to have union dues and fees deducted from their wages each month notwithstanding the invalidity and unenforceability of the compulsory agency fee agreement pursuant to which such check-off authorizations were executed.

7. Plaintiffs are informed and believe that it would be impossible at this time to ascertain which of the

employees of defendant Board of Education had voluntarily executed dues check-off authorizations and which of the said employees executed such authorizations under coercion and duress in fear of loss of their employment.

NOW THEREFORE, in view of the impossibility of ascertaining the identity of those employees of defendant Board of Education who are voluntary union members or agency fee payers, and those employees who signed check-off authorization cards under duress, plaintiffs respectfully move the Court to order

(1) that defendant Board of Education shall treat all check-off authorizations as ineffective and cancelled, and shall immediately cease making any payroll deductions based upon such authorizations; and

(2) that defendant Detroit Federation of Teachers shall have sixty days from the date of the Court's order to obtain newly executed membership dues check-off authorizations and deliver the same to the Board of Education which newly executed authorizations will then authorize the Board to resume payroll deductions in accordance therewith.

8. I hereby certify that I have complied with all provisions of the Wayne County Circuit Court Rule 9.4, on motion practice. The undersigned requested the concurrence of Mr. Theodore Sachs, Counsel for Defendant Detroit Federation of Teachers in the motion and the relief sought on June 15, 1973. Such

concurrence has been denied and it is necessary to present this motion.

Respectfully submitted,

/s/ Charles E. Keller
Charles E. Keller

/s/ John L. Kilcullen
John L. Kilcullen
Attorneys for Plaintiffs

KELLER, THOMA, McMANUS,
TOPPIN & SCHWARZE
1600 Penobscot Building
Detroit, Michigan 48226
Telephone: 313/965-7610
WEBSTER & KILCULLEN
Suite 1000
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Telephone: 202/785-9500

[Attachments omitted in printing.]

**Warczak Answer to Motion to Suspend
Dues Deduction Authorizations
[Filed July 5, 1973]**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**ANSWER TO MOTION TO SUSPEND DUES
DEDUCTION AUTHORIZATIONS**

Now come defendants by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid, and in answer to Motion to Suspend Dues Deduction Authorizations, aver:

1. Answering paragraph 1, defendants respectfully refer the Court to the terms of said agreement which is of record herein.

2. Answering paragraph 2, defendants deny said allegations for the reason that same are contrary to fact.

3. Answering paragraph 3, defendants admit said allegations except as to plaintiffs' characterization of the agency shop clause.

4. Answering paragraph 4, defendants admit the same.

5. Answering paragraph 5, defendants admit the same.

6. Answering paragraph 6, defendants deny said allegations for the reason that said allegations are contrary to fact.

7. Answering paragraph 7, defendants deny that any employees involuntarily executed dues checkoff authorizations or executed such authorizations under coercion and duress.

8. In further answer, defendants aver that said motion is without merit and the Court without jurisdiction, in that:

(1) Plaintiffs fail to state a claim upon which relief can be granted.

(2) The cause is moot.

(3) Plaintiffs are without standing to raise the matters set forth in said motion.

(4) Plaintiffs are not the real parties in interest to raise the matters set forth in said motion.

(5) The relief prayed is not encompassed in plaintiffs' amended complaint.

(6) There is no basis in law or in equity for the relief prayed.

(7) There is no evidentiary basis for the relief prayed.

WHEREFORE, defendants pray that said motion be denied.

Respectfully submitted,

MARSTON, SACHS, O'CONNELL,
NUNN & FREID

by /s/ Theodore Sachs
Theodore Sachs

Attorneys for defendants
1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: July 5, 1973

Motion of Defendants for Summary Judgment
[Filed July 5, 1973]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**MOTION OF DEFENDANTS FOR SUMMARY
JUDGMENT IN THEIR BEHALF [, ON REMAND] ***

Now come defendants, Detroit Federation of Teachers, et al., by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid (formerly Rothe, Marston, Mazey, Sachs & O'Connell), and move for summary judgment in their behalf, [upon remand,] * pursuant to GCR 1963, 117.2(1), for the reasons that:

1. Plaintiffs and added plaintiffs have failed to state a claim upon which relief can be granted.
2. The cause is moot.

I certify that I have complied with Wayne County Circuit Court Rule 9.4. Opposing counsel have declined to concur in this motion.

MARSTON, SACHS, O'CONNELL,
NUNN & FREID

by /s/ Theodore Sachs
Theodore Sachs
Attorneys for defendants
1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: July 5, 1973.

*[Bracketed portions appear in *Warczak* motion only.]

**Answer to Motion of Defendants for
Summary Judgment**
[Filed July 13, 1973]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title Omitted in printing.]

**ANSWER TO MOTION OF DEFENDANTS FOR
SUMMARY JUDGMENT IN THEIR BEHALF**

Now come Plaintiffs by their attorneys, Keller, Thoma, McManus, Toppin & Schwarze, and Webster and Killcullen, and in answer to Motion of Defendants for Summary Judgment in Their Behalf, aver:

1. Answering paragraph 1, Plaintiffs deny said allegations for the reason that same are contrary to fact and law.
2. Answering paragraph 2, Plaintiffs deny said allegations for the reason that same are contrary to fact and law.

WHEREFORE, Plaintiffs pray that said motion be denied.

Respectfully submitted,

KELLER, THOMA, McMANUS,
TOPPIN & SCHWARZE

by /s/ Charles E. Keller
Charles E. Keller
Attorneys for Plaintiffs
1600 Penobscot Building
Detroit, Michigan 48226
(313) 965-7610

WEBSTER & KILCULLEN

by /s/ John L. Kilcullen
John L. Kilcullen

1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500

DATED: July 12, 1973

Supplement and Amendment to
Answer of Defendants
[Filed July 13, 1973]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

SUPPLEMENT AND AMENDMENT TO
ANSWER OF DEFENDANTS

Now come Detroit Board of Education, Detroit Federation of Teachers, Mary Ellen Riordan, John Elliott, Marilyn Klein, and Paul Richards, defendants herein, by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid (formerly, Rothe, Marston, Mazey, Sachs, O'Connell, Nunn & Freid), and file this supplement and amendment to their answer heretofore filed, averring:

COUNT I.

Affirmative Defenses, paragraph 7:

7. Plaintiffs' action is moot in that,

(a) There has been enacted into law enrolled Senate Bill 433, immediately effective June 14, 1973, validating agency shop agreements. 1973 PA 25.

(b) The time period complained of has expired.

(c) A substantial number of the plaintiffs have become members of defendant Federation.

WHEREFORE, defendants pray for dismissal of said Count with costs to defendants.

COUNT II.

Affirmative Defenses.

Delete paragraph 4.

Add new paragraphs as follows:

4. Plaintiffs are without standing.

5. Plaintiffs' action is moot in that,

(a) There has been enacted into law enrolled Senate Bill 433, immediately effective June 14, 1973, validating agency shop agreements. 1973 PA 25.

(b) The time period complained of has expired.

(c) A substantial number of the plaintiffs have become members of the defendant Federation.

WHEREFORE, defendants pray for dismissal of said Complaint, with costs to defendants.

MARSTON, SACHS, O'CONNELL,
NUNN & FREID

by /s/ Theodore Sachs

Theodore Sachs

Attorneys for defendants

1000 Farmer

Detroit, Michigan 48226

965-3464

DATED: July 13, 1973

Opinion of Wayne County Circuit Court
[Filed November 7, 1973]

STATE OF MICHIGAN

**IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE**

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al., Plaintiffs,

-vs-

No. 145 080

THE BOARD OF EDUCATION OF THE
CITY OF DETROIT, DETROIT
FEDERATION OF TEACHERS, et al.,
Defendants.

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,
Plaintiffs,

-vs-

No. 155 255

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, et al.,
Defendants.

**OPINION RE: DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND PLAINTIFFS'
MOTION TO SUSPEND DUES DEDUCTIONS.**

These matters come before this Court on the plaintiffs' motion to suspend dues deductions and defendant's motion for summary judgment. Both these matters eventuate as a result of the Michigan State Supreme Court's decision in the case of *Smigel v Southgate School District*, 388 Mich 531. It appears that this aforementioned case had issues before the

Supreme Court identical to the issues which this Court originally decided in the instant matters before this Court now.

It would appear that there is really only one issue before this Court at this time which will be dispositive of the entire controversy. That one issue is whether or not the Legislative Enactment 1973 PA 25 should be given retrospective effect or whether it should act only prospectively.

It appears that in the *Smigel* decision our Supreme Court in determining that the Public Employment Relations Act did not specifically provide for an agency shop, held that the agreement providing for same was contrary to the statute. If we look only to the words of the legislature in determining the legislative intent we find that the original act is silent as to an authorization for an agency shop. However, in looking at the amendment of the Public Employment Relations Act added by 1973 PA 25 there are clear and unequivocal words of intent of the legislature which indicate that the purpose of the amendatory act is to *reaffirm the continuing public policy of this state* that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to it a service fee which may be equivalent to the amount of dues required by members. It would appear to this Court that in setting forth a public policy not only prospectively but also indicating it has always been the public policy of this state to make such a provision, that the legislature is indicating that while the Supreme Court may have correctly read the statute, as originally promulgated, the legislature is now making clear what it meant so that the effect of the

Supreme Court's decision may be nullified. It should be noted here that it is the legislature which determines the public policy of a state and not a court.

This Court is at a loss to find any vested rights in the previous statute or in the decision of the Supreme Court redounding to the plaintiffs' benefit which would constitute a deprivation of any of their constitutional rights to have it now removed by the legislature. The defendants cite in their brief numerous instances where legislation may be retrospective. It will be unnecessary in this opinion to restate those cases or the points of law for which they stand.

This Court would hold that since the legislature specifically and validly indicated that it is reaffirming the continuing public policy of this State and inasmuch as this is an amendatory act, this Court would hold not only that the legislature intended retrospective application but that under all the circumstances pertaining to the matters now before the Court this is the only construction which squares with reality.

A judgment in accordance with this opinion may be presented.

/s/ CHARLES KAUFMAN

CHARLES KAUFMAN
Circuit Judge

November 5, 1973

A TRUE COPY
JOSEPH B. SULLIVAN
CLERK
BY /s/
Deputy Clerk

Summary Judgment for Defendants
[Filed December 5, 1973]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

CHRISTINE WARCZAK, ERNEST C.
SMITH, JUDITH KENNEDY, AGNES
STILLWELL, et al.,

No. 145 080

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE
CITY OF DETROIT, DETROIT
FEDERATION OF TEACHERS, et al.,
Defendants.

D. LOUIS ABOOD, MARY ACETI,
JOYCE C. ALEXANDER, et al.,
Plaintiffs,

No. 155 255

vs.

DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF
TEACHERS, et al.,

Defendants.

SUMMARY
JUDGMENT
FOR
DEFENDANTS,
UPON
REMAND

At a session of said Court held in the
City-County Building in the City of
Detroit, Michigan on
DEC 5 1973

PRESENT: HONORABLE CHARLES KAUFMAN,
WAYNE CIRCUIT JUDGE.

These matters having come on to be heard on remand, following Order of the Michigan Supreme Court dated December 28, 1972 (in No. 145-080), on

(1) motion of defendants for summary judgment in their behalf pursuant to GCR 1963, 117.2(1), for the reason that plaintiffs and added plaintiffs fail to state a claim upon which relief can be granted and (2) on plaintiffs' motion to suspend dues deductions, and the Court having heard arguments thereon, and having considered the briefs of counsel thereon, and the Court being fully advised in the premises, and having rendered its Opinion dated November 5, 1973, to which reference is made, now, therefore,

IT IS ORDERED AND ADJUDGED that 1973 PA 25 (immediately effective June 14, 1973), §§ 10(1)(c) Proviso and (2), specifically and validly, prospectively and retrospectively, authorizes agency shop agreements in public employment; and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs, by their complaint and amended complaint, have failed to state a claim upon which relief can be granted; and

IT IS FURTHER ORDERED AND ADJUDGED that the agency shop clause in the collective bargaining agreement between the defendant Detroit Board of Education and defendant Detroit Federation of Teachers is valid and of full force and effect according to its terms; and

IT IS FURTHER ORDERED AND ADJUDGED that said agency shop clause does not contravene the Constitution of the United States or of the State of Michigan or the statutes of the State of Michigan.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion to suspend dues deductions is DENIED, for want of merit.

/s/ CHARLES KAUFMAN
WAYNE CIRCUIT JUDGE

Approved as to form only: -

/s/ Charles E. Keller
Charles E. Keller

/s/ Charles Fine
Charles Fine

A TRUE COPY
JOSEPH B. SULLIVAN
CLERK
BY /s/
Deputy Clerk

**Order Denying Plaintiffs' Motion
for Rehearing**

[Filed January 24, 1974]

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

[Title omitted in printing.]

**ORDER DENYING PLAINTIFFS'
MOTION FOR REHEARING**

At a session of said Court held
in the City-County Building in the
City of Detroit, Michigan on
JAN 24 1974

PRESENT: HONORABLE CHARLES KAUFMAN,
WAYNE CIRCUIT JUDGE.

This matter having come on to be heard on January 4, 1974, on plaintiffs' Motion For Rehearing of the Order Denying Motion to Suspend Dues Deduction and Granting the Defendants' Motion For Summary Judgment; and the parties having filed briefs for and in opposition to said motion; and the parties having presented oral arguments thereon in open Court on the record; and the Court being fully advised in the premises and having indicated its reasons and decision on the record, now, therefore,

IT IS ORDERED that said Motion be and the same is hereby DENIED.

/s/ CHARLES KAUFMAN
WAYNE CIRCUIT JUDGE

[Clerk's certificate omitted in printing.]

Order Consolidating Appeals
[Entered March 22, 1974]

AT A SESSION OF THE COURT OF APPEALS OF
THE STATE OF MICHIGAN, Held at the Court of
Appeals in the City of Detroit, on the twenty-second
day of March in the year of our Lord one thousand
nine hundred and seventy-four.

Present the Honorable

T. JOHN LESINSKI
Presiding Judge
VINCENT J. BRENNAN
GEORGE N. BASHARA, Jr.
Judges

[Title omitted in printing.]

In these causes, on the Court's own motion, IT IS
ORDERED that Docket #19465 be and the same
hereby is CONSOLIDATED with Docket #19523 for
the purpose of the hearing on the merits.

[Clerk's certificate omitted in printing.]

Extracts from Brief in Support of Claim
of Appeal

[Filed April 11, 1974]

STATE OF MICHIGAN

IN THE COURT OF APPEALS

[Title omitted in printing.]

BRIEF IN SUPPORT OF CLAIM OF APPEAL

* * * * *

I. STATEMENT OF QUESTIONS INVOLVED

- A. WHETHER THE ALLEGATIONS OF FACT IN THE COMPLAINT MUST BE ASSUMED TO BE TRUE?

The Trial Court did not rule upon this issue. The Appellants contend that the answer is YES.

- B. WHETHER ENFORCEMENT OF AN AGENCY SHOP PROVISION BY THE DEFENDANT DETROIT BOARD OF EDUCATION AND THE FEDERATION IS SUBJECT TO CONSTITUTIONAL LIMITATION?

The Trial Court did not rule upon this issue. The Appellants contend that the answer is YES.

- C. WHETHER THE AGENCY SHOP CLAUSE CONTAINED IN THE DEFENDANTS' COLLECTIVE BARGAINING AGREEMENT, IMPOSED

UNDER COLOR OF SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT, VIOLATES PLAINTIFF TEACHERS' RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

- (1) WHETHER PLAINTIFF TEACHERS ARE ENTITLED TO THE FULL CONSTITUTIONAL RIGHTS OF SPEECH, ASSOCIATION AND BELIEF SECURED BY FIRST AMENDMENT?

The Trial Court by implication answered this question NO. The Appellants contend that the answer is YES.

- (2) WHETHER PLAINTIFF TEACHERS' RIGHTS SECURED BY THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THEM FROM THE IMPOSITION, THROUGH THE AGENCY SHOP CLAUSE, OF COMPULSORY MEMBERSHIP IN, OR PAYMENTS TO, THE FEDERATION AS A CONDITION OF EMPLOYMENT?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

- (a) WHETHER THE AGENCY SHOP CLAUSE, ON ITS FACE, AND IN ITS OPERATION AND EFFECT, IMPERMISSIBLY COMPELS MEMBERSHIP IN THE FEDERATION?

The Trial Court by implication answered this question NO. The Appellants contend that the answer is YES.

- (b) WHETHER THE AGENCY SHOP CLAUSE IMPERMISSIBLY COMPELS, AS A CONDITION OF EMPLOYMENT, THAT PLAINTIFF TEACHERS CONTRIBUTE MONETARY SUPPORT TO THE FEDERATION, CONTRARY TO THEIR RIGHTS OF SPEECH, ASSOCIATION AND BELIEF SECURED BY THE FIRST AMENDMENT?

The Trial Court by implication answered this question NO. The Appellants contend that the answer is YES.

- (c) WHETHER THE INFRINGEMENT UPON PLAINTIFF TEACHERS' RIGHTS OF ASSOCIATION, SPEECH AND BELIEF SECURED BY THE FIRST AMENDMENT MUST BE SUPPORTED BY A DEMONSTRATED COMPELLING STATE INTEREST?

The Trial Court by implication answered this question NO. The Appellants contend that the answer is YES.

- (d) WHETHER CONSTITUTIONAL QUESTIONS ARE SQUARELY PRESENTED HERE?

The Trial Court did not rule upon this issue. The Appellants contend that the answer is YES.

- (3) WHETHER PLAINTIFF TEACHERS' RIGHTS SECURED BY THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THEM FROM THE IMPOSITION, THROUGH THE

AGENCY SHOP CLAUSE, OF COMPULSORY PAYMENTS TO POLITICAL, ECONOMIC, SOCIAL, RELIGIOUS, SCIENTIFIC AND CULTURAL MATTERS OPPOSED BY THEM?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

- D. WHETHER THE LEGISLATIVE INTENT OF THE 1973 AMENDMENT TO SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT WAS TO PERMIT EXACTION OF COMPULSORY AGENCY FEES FOR POLITICAL PURPOSES AND OTHER PURPOSES NOT GERMANE TO COLLECTIVE BARGAINING?

The Trial Court did not rule upon this issue. The Plaintiffs contend that the answer is YES.

- E. WHETHER THE AGENCY SHOP CLAUSE CONTAINED IN THE DEFENDANTS' COLLECTIVE BARGAINING AGREEMENT, IMPOSED UNDER COLOR OF SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT, VIOLATES THE PLAINTIFF TEACHERS' RIGHTS UNDER THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

- F. WHETHER THE AGENCY SHOP CLAUSE CONTAINED IN THE DEFENDANTS' COLLECTIVE BARGAINING AGREEMENT, IMPOSED UNDER COLOR OF SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT, VIOLATES

THE PLAINTIFF TEACHERS' RIGHTS TO EQUAL PROTECTION OF THE LAWS SECURED BY THE FOURTEENTH AMENDMENT?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

G. WHETHER THE COMPELLING INTEREST TESTS CAN BE SATISFIED ON A MOTION FOR SUMMARY JUDGMENT?

The Trial Court did not rule upon this issue. The Appellants contend that the answer is NO.

H. WHETHER THE AGENCY SHOP CLAUSE, IMPOSED UNDER COLOR OF SECTION 10 (1) (c) AND (2) OF THE PUBLIC EMPLOYMENT RELATIONS ACT, WHEN CONSIDERED UNDER THE COMPELLING INTEREST TESTS, IS VOID ON ITS FACE?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

I. WHETHER THE AGENCY SHOP CLAUSE CONTAINED IN THE DEFENDANTS' COLLECTIVE BARGAINING AGREEMENT, IMPOSED UNDER COLOR OF SECTION 10 OF THE PUBLIC EMPLOYMENT RELATIONS ACT, VIOLATES APPELLANT TEACHERS' RIGHTS UNDER THE MICHIGAN CONSTITUTION?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

J. WHETHER THE LOWER COURT ERRED IN RULING THAT 1973 P.A. 25 IS TO BE GIVEN RETROSPECTIVE APPLICATION?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

K. WHETHER THE PLAINTIFF TEACHERS ARE ENTITLED TO INJUNCTIVE RELIEF?

The Trial Court answered this question NO. The Appellants contend that the answer is YES.

* * * * *

APPENDIX "H"

STATE OF MICHIGAN JOURNAL OF THE HOUSE No. 27 - March 14, 1973

* * * * *

House Bill No. 4243, entitled

A bill to amend section 10 of Act No. 336 of the Public Acts of 1947, entitled as amended "An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act," being section 423.210 of the Compiled Laws of 1970.

The bill was read a second time.

* * * * *

Reps. Defebaugh and Damman moved to amend the bill as follows:

1. Amend page 2, line 9, after "TO", by striking out "THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE", and inserting "THAT PORTION OF THE DUES THAT IS DIRECTLY ATTRIBUTABLE TO THE COST OF CONTRACT NEGOTIATION".
2. Amend page 2, line 16, after "EMPLOYEES", by striking out "EQUALLY".

The question being on the adoption of the amendments offered by Reps. Defebaugh and Damman, Rep. Defebaugh demanded the yeas and nays. The demand was supported.

* * * * *

The question being on the adoption of the amendments offered by Reps. Defebaugh and Damman,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 45 Yeas—24

* * * * *

Nays—76

* * * * *

Rep. Bryant moved to amend the bill as follows:

1. Amend page 2, line 10, after "REPRESENTATIVE", by inserting "WHICH APPROXIMATES THAT PORTION OF DUES ATTRIBUTABLE TO ACTUAL COLLECTIVE BARGAINING EXPENSES".
2. Amend page 2, line 16, after "EMPLOYEES", by striking out "EQUALLY".

The question being on the adoption of the amendments offered by Rep. Bryant,

Rep. Bryant demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendments offered by Rep. Bryant,

The amendments were not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 46 Yeas—27

* * * * *

Nays—73

* * * * *

Reps. Cawthorne, Dively and Bradley moved to amend the bill as follows:

1. Amend page 2 by striking out all of lines 14, 15, 16, 17 and 18 and inserting

"(2) IT IS THE PURPOSE OF THIS AMENDATORY ACT TO REAFFIRM THE CONTINUING PUBLIC POLICY OF THIS STATE THAT THE STABILITY AND EFFECTIVENESS OF LABOR RELATIONS IN THE PUBLIC SECTOR REQUIRE, IF SUCH REQUIREMENT IS NEGOTIATED WITH THE PUBLIC EMPLOYER, THAT ALL EMPLOYEES IN THE BARGAINING UNIT SHALL SHARE FAIRLY IN THE FINANCIAL SUPPORT OF THEIR EXCLUSIVE BARGAINING REPRESENTATIVE BY PAYING TO THE EXCLUSIVE BARGAINING REPRESENTATIVE A SERVICE FEE WHICH MAY BE EQUIVALENT TO THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF

THE EXCLUSIVE BARGAINING REPRESENTATIVE."

The question being on the adoption of the amendment offered by Reps. Cawthorne, Dively and Bradley,

Rep. Strang moved to amend the amendment as follows:

1. Amend the last "REPRESENTATIVE.", by inserting "NONE OF SUCH MONIES COLLECTED SHALL BE USED IN ANY PARTISAN POLITICAL CAMPAIGN."

The question being on the adoption of the amendment to the amendment offered by Rep. Strang, Rep. Strang demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendment to the amendment offered by Rep. Strang,

The amendment to the amendment was not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 47 Yeas—40

* * * * *

Nays—59

* * * * *

The question being on the adoption of the amendment offered by Reps. Cawthorne, Dively, and Bradley,

The amendment was adopted, a majority of the members serving voting therefor.

Rep. Engler moved to amend the bill as follows:

1. Amend page 2, line 10, after "REPRESENTATIVE", by striking out the semicolon and inserting a period and "THE EXCLUSIVE BARGAINING

REPRESENTATIVE SHALL PROVIDE TO ALL BARGAINING UNIT EMPLOYEES ANNUALLY A DETAILED STATEMENT COVERING THE EXPENDITURES OF ALL FUNDS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE;"

The question being on the adoption of the amendment offered by Rep. Engler,

After debate,

Rep. Raymond W. Hood demanded the previous question.

The demand was supported.

The question being, "Shall the main question now be put?"

The previous question was ordered.

The question being on the adoption of the amendment offered by Rep. Engler,

Rep. Mastin demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendment offered by Rep. Engler,

The amendment was not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 48 Yeas—24

* * * * *

Nays—76

* * * * *

Rep. Baker moved to amend the bill as follows:

1. Amend page 2, section (2), last line, after "REPRESENTATIVE", by inserting "FOR BARGAINING PURPOSES ONLY".

The question being on the adoption of the amendment offered by Rep. Baker,

After debate,

Rep. Raymond W. Hood demanded the previous question.

The demand was supported.

The question being, "Shall the main question now be put?"

The previous question was ordered.

The question being on the adoption of the amendment offered by Rep. Baker,

Rep. Raymond W. Hood demanded the yeas and nays.

The demand was supported.

The question being on the adoption of the amendment offered by Rep. Baker,

The amendment was not adopted, a majority of the members serving not voting therefor, by yeas and nays, as follows:

Roll Call No. 49 Yeas—32

* * * * *

Nays—71

* * * * *

Rep. Bradley moved that the bill be placed on the order of Third Reading of Bills.

The motion prevailed, a majority of the members present voting therefor.

* * * * *

APPENDIX "I"

STATE OF MICHIGAN JOURNAL OF THE SENATE No. 58 - May 22, 1973

* * * * *

The following bill was read a third time:

Senate Bill No. 433, entitled

A bill to amend sections 1 and 7 of Act No. 336 of the Public Acts of 1947, entitled as amended "An act to prohibit strikes by certain public employees; to provide review from disciplinary action with respect thereto; to provide for the mediation of grievances and the holding of elections; to declare and protect the rights and privileges of public employees; and to prescribe means of enforcement and penalties for the violation of the provisions of this act," being sections 423.201 and 423.207 of the Compiled Laws of 1970.

The question being on the passage of the bill,

Senators Bishop and Fleming offered the following amendments:

(References are to Senate Journal No. 48, p. 664.)

1. Amend Committee Amendment No. 2, line 11, after "SERVICE FEE" by striking out "NOT MORE THAN THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE" and inserting "EQUAL TO HIS PROPORTIONATE SHARE OF THE COST OF NEGOTIATING THE COLLECTIVE BARGAINING CONTRACT".

2. Amend Committee Amendment No. 2, subsection (2), line 6, after "MAY" by striking out "NOT MORE THAN THE AMOUNT OF DUES UNIFORMLY REQUIRED OF MEMBERS OF THE EXCLUSIVE BARGAINING REPRESENTATIVE" and inserting "EQUAL HIS PROPORTIONATE SHARE OF THE COST OF NEGOTIATING THE COLLECTIVE BARGAINING CONTRACT".

The amendments were not seconded, a majority of the Senators voting, not voting therefor.

Senator Bishop requested the yeas and nays.

The yeas and nays were not ordered, 1/5 of the Senators present not voting therefor.

Senators Bishop and Fleming offered the following amendment:

(References are to Senate Journal, No. 48, p. 664.)

Amend Committee Amendment No. 2, subsection (2), line 8, after "REPRESENTATIVE." by inserting "NO PORTION OF ANY MONEYS REQUIRED TO BE PAID AS UNION DUES OR SERVICE FEES SHALL BE USED DIRECTLY OR INDIRECTLY IN ANY PARTISAN OR NONPARTISAN POLITICAL CAMPAIGN."

The amendment was not seconded, a majority of the Senators voting, not voting therefor.

Senator Bishop requested the yeas and nays.

The yeas and nays were ordered, 1/5 of the Senators present voting therefor.

The Senators voted as follows:

| | |
|--------------------------|----------------|
| Roll Call No. 115 | Yeas—12 |
| | * * * * * |
| | Nays—21 |

* * * * *

The amendment was not seconded, a majority of the Senators voting, not having voted therefor.

* * * * *

Senators Bishop and Fleming offered the following amendment:

(References are to Senate Journal No. 48, p. 664).

Amend Committee Amendment No. 2, subsection (2), line 8, after "REPRESENTATIVE." by inserting "NO PORTION OF ANY MONEYS REQUIRED TO BE PAID AS SERVICE FEES SHALL BE USED DIRECTLY OR INDIRECTLY IN ANY PARTISAN POLITICAL CAMPAIGN."

The amendment was not seconded, a majority of the Senators voting, not voting therefor.

Senator Fleming requested the yeas and nays.

The yeas and nays were ordered, 1/5 of the Senators present voting therefor.

The Senators voted as follows:

| | |
|--------------------------|----------------|
| Roll Call No. 118 | Yeas—13 |
| | * * * * * |
| | Nays—21 |
| | * * * * * |

The amendment was not seconded, a majority of the Senators voting, not having voted therefor.

After debate,

Senator McCauley demanded the previous question. On which motion Senator Bishop requested the yeas and nays.

The yeas and nays were not ordered, 1/5 of the Senators present not voting therefor.

The previous question was ordered, a majority of the Senators voting, voting therefor.

The question then being on the passage of the bill, the Senators voted as follows:

Roll Call No. 119 Yeas—28

* * * * *

Nays—7

* * * * *

The bill was passed, a majority of the Senators serving having voted therefor.

* * * * *

Opinion of the Michigan Court of Appeals

[Entered March 31, 1975]

STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 1

D. LOUIS ABOOD, MARY ACETI, MAR 31 1975
JOYCE C. ALEXANDER, et al.,

Plaintiffs-Appellants,

v

MAR 31 1975

Docket #19465

**DETROIT BOARD OF EDUCATION,
DETROIT FEDERATION OF TEACHERS,
et al.,**

Defendants-Appellees.

**CHRISTINE WARCZAK, et al.,
Plaintiffs-Appellants,**

v

Docket #19523

DETROIT BOARD OF EDUCATION,
et al.,

Defendants-Appellees.

BEFORE: McGregor, P.J., and J.H. Gillis and Quinn,
J.J.

PER CURIAM

Plaintiffs Christine Warczak and others, all Detroit teachers, filed a complaint for declaratory judgment on November 7, 1969, challenging the constitutional and statutory validity of the agency shop provision in the collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers. Plaintiffs filed the cause of action on behalf of themselves and all others similarly situated. Named as defendants were the Detroit Board of Education, the Detroit Federation of Teachers and all teachers who are members of the Federation.

Defendants moved for summary judgment, which was granted on January 19, 1970 by the trial court. Plaintiffs appealed the grant of the summary judgment. The Michigan Supreme Court granted plaintiffs leave to appeal and set aside the summary judgment entered in favor of defendants, based on the decision in *Smigel v Southgate School District*, 388 Mich 531; 202 NW2d 305 (1972). The case was remanded to the circuit court "for further proceedings consonant herewith."

Thereafter, in the trial court, plaintiffs filed a motion for suspension of dues deduction authorizations. The defendants, on the other hand, filed a motion for summary judgment based on the then recent amendment to the Public Employment Relations Act authorizing agency shop provisions in collective bargaining agreements between public employers and public employees. MCLA 423.210; MSA 17.455(10).

The trial court granted defendants' motion for summary judgment and denied plaintiffs' motion to

suspend dues deductions. In its opinion, the trial court stated that the amendment should be given retroactive effect. Plaintiffs appealed. On March 25, 1974, the Court of Appeals, on its own motion, entered an order consolidating this appeal with another pending appeal, *Abood et al v Detroit Board of Education, et al*.

In the *Abood* case, the complaint is essentially the same as that filed in the *Warczak* case, except that the named plaintiffs are more numerous and do not claim to represent any others than themselves. They also allege that they have been threatened with dismissal and are requesting injunctive relief to restrain the enforcement of the agency shop clause. A motion for summary judgment was granted in favor of defendants in that case and plaintiffs appealed.

I.

Should MCLA 423.210; MSA 17.455(10), effective June 14, 1973 and authorizing agency shop provisions in public employment contracts, be given retroactive effect so as to validate the agency shop provision in the contract entered into between the Detroit Federation of Teachers and the Detroit Board of Education?

In the *Smigel* case, *supra*, the Supreme Court of Michigan found that an agency shop provision in a contract between the Southgate Education Association and the Southgate Community School District was prohibited by §10 of the Public Employments Relations Act [PERA].

Justice T.M. Kavanagh pointed out in his opinion that there was a significant distinction in Michigan's labor law between public and private employees.

"Though MCLA 423.16; MSA 17.454(17) is nearly identical to MCLA 423.210; MSA 17.455(10) in respect to the requirement of employer neutrality, the statute regarding private employment includes one very important provision which is not found in the public employment relations act. MCLA 423.14; MSA 17.454(15) constitutes an authorization of union security clauses whether in the form of 'closed shop', 'union shop' or 'agency shop.'" 388 Mich at 539-540; 202 NW2d at 306.

Since such an authorization was not included by the Legislature in the PERA, the Supreme Court concluded that the agency shop provision in *Smigel* was prohibited by the PERA.

This was the state of the law when the *Abood* and *Warczak* cases were remanded to the circuit court. Subsequently, however, the Legislature amended the PERA to provide:

"That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." MCLA 432.210; MSA 17.455(10).

In the same section, the Legislature gave some indication of its intent in enacting the amendment.

"(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. MCLA 423.210; MSA 17.455(10).

In ruling that the amendment in question should be given retroactive application, the trial court stated that, by clear and unequivocal words of intent, the Legislature indicated its desire that the amendment be given such retroactive application. We respectfully disagree.

The most often-quoted statement of the law concerning retroactivity is found in *Detroit Trust Co. v Detroit*, 269 Mich 81, 84; 256 NW 811, 812-813 (1934):

"We think it is settled as a general rule in this State, as well as in other jurisdictions, that all statutes are prospective in their operation excepting in such cases as the contrary clearly appears from the context of the statute itself.

" "Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be, that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred

by necessary, unequivocal and unavoidable implication from the words of the statute taken by themselves and in connection with the subject matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention." Endlich, *Interpretation of Statutes*, § 271." See also, *In re Davis' Estate*, 330 Mich 647, 650-651; 48 NW2d 151 (1951); *Briggs v Campbell, Wyant & Cannon*, 379 Mich 160, 164-165; 150 NW2d 752 (1967); *Olkowski v Aetna Casualty*, 53 Mich App. 497, 503; 220 NW2d 97 (1974).

Considering "the occasion of the enactment" of the amendment, one might conclude that it should be given retroactive effect. However, as noted in *Detroit Trust Co, supra*, that is only one element. While that element may favor retroactivity, it is still necessary to consider the language of the amendment itself and to determine the Legislature's intention.

The amendment in question states that its purpose is to "reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require * * * that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative."

The Legislature's use of the word "reaffirm" seems to indicate that it was their feeling that such was always the policy of this State. However, *Smigel* held to the contrary. That the Legislature felt that it had always been the public policy of this State to permit agency shop clauses in the public sector, and that it said so in the amendment, is not enough to overcome the presumption favoring prospective application of the amendment.

Therefore, it is our conclusion that the trial court erred in giving retroactive application to the amendment.

II

Does the agency shop clause violate plaintiffs' First and Fourteenth Amendment rights securing freedom of speech and freedom of association?

In *Railway Employees' Department v Hanson*, 351 US 225, 238; 76 S Ct 714, 721; 100 L Ed 1112, 1134 (1956), the Supreme Court considered the question whether a union shop agreement forces workers into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.

The Court held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work * * * does not violate either the First or Fifth Amendments." See also *Buckley v American Federation of Television & Radio Artists*, 496 F2d 305, 313 (1974).

However, the Court did not consider whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining. That issue was not presented in *Hanson*, but it is squarely before us in the case at bar.

MCLA 423.210; MSA 17.455(10) provides for "a service fee which may be equivalent to the amount of

dues uniformly required of members of the exclusive bargaining representative."

The political activities of labor unions are well-recognized. It is reasonable to assume that least a portion of every union's budget goes to activities that could be termed political, e.g., support of candidates sympathetic to the union cause and lobbying for the passage of bills in the legislature. Since the amendment to MCLA 423.210; MSA 17.455(10) does not limit the nonmember's contribution to his proportionate share of the costs of collective bargaining, it is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining.

In *International Association of Machinists v Street*, 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1964), the United States Supreme Court faced a situation that is nearly on all fours with the case at bar. *Street* involved the same provision of the Railway Labor Act which was considered in *Hanson, supra*. But in *Street* six employees brought action, on behalf of themselves and of employees similarly situated, alleging that the money each was thus compelled to pay to hold his job was in substantial part used to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed.

The Supreme Court did not pass directly on the constitutional issues, instead construing the statute to deny railroad unions the right, over the employee's objection, to use his money to support political causes which he opposes. Since the statute under consideration here admits of no such construction, the constitutional issue requires decision.

We have before us then, two powerful countervailing public policies. We are asked, on the one hand, to preserve freedom of expression, and, on the other, to promote labor stability. But freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded. This is particularly true where, as here, employees are compelled by the government to support the collective bargaining activities of an organization which they prefer not to join. Justice Douglas expressed this concern well in his concurring opinion in *Street*:

"If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees." 367 US at 776; 81 S Ct at 1804; 6 L Ed 2d at 1165.

Therefore, we conclude that the agency shop clause, as prospectively authorized by the amendment to MCLA 423.210; MSA 17.455(10) could violate plaintiffs' First and Fourteenth Amendment rights.

First, however, it should be noted that this is not a true class action. As the Supreme Court pointed out in *Street, supra*:

"Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object * * *. From these considerations, it follows

that the present action is not a true class action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes." 367 US at 774; 81 S Ct at 1803; 6 L Ed 2d at 1164.

Thus it is that whatever relief is fashioned can only be applied to those Detroit teachers who have specifically protested the use of their funds for political purposes to which they object.

Further, the Supreme Court made it clear in *Street* that injunctive relief is not the proper remedy:

"Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." 367 US at 771; 81 S Ct at 1801; 6 L Ed 2d at 1162.

The Court suggested two possible remedies. 367 US at 774-775; 81 S Ct at 1803; 6 L Ed 2d at 1164-1165. The first is an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the total union budget.

The second method would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he

was opposed. This is the method we prefer since, in each instance, the drawing up of a financial statement will be required to determine the proportion of union funds used for a particular purpose, and this method will least interfere with unions carrying out their daily functions.

To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.

In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore the plaintiffs are not entitled to relief on this basis.

The judgment of the lower court must be reversed, however, as to the retroactive application given to MCLA 423.210; MSA 17.455(10).

Reversed and remanded. No costs, a public question being involved.

Order Reversing and Remanding
[Entered March 31, 1975]

AT A SESSION OF THE COURT OF APPEALS OF
THE STATE OF MICHIGAN, Held at the Court of

Appeals in the City of Detroit, on the 31st day of
March in the year of our Lord one thousand nine
hundred and seventy-five.

Present the Honorable
Louis D. McGregor
Presiding Judge
John H. Gillis
Timothy C. Quinn
Judges

D. Louis Abood, Mary Aceti, Joyce
C. Alexander, et al.,
Plaintiffs-Appellants

vs

Detroit Board of Education,
Detroit Federation of Teachers, et al.,
Defendants-Appellees No. 19465

Christine Warczak, et al.,
Plaintiffs-Appellants

vs

Detroit Board of Education, et al.,
Defendants-Appellees No. 19523

This cause having been brought to this Court by
appeal from Wayne County Circuit Court, and having
been argued by counsel, and due deliberation had
thereon, it is now ordered by the Court, that the

judgment of the trial court be and the same is hereby reversed and remanded. No costs, a public question being involved.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 10th day of June in the year of our Lord one thousand nine hundred and seventy-five.

/s/ Ronald L. Dzierbicki

Clerk

Application for Rehearing
[Filed April 18, 1975]

STATE OF MICHIGAN

IN THE COURT OF APPEALS

[Title omitted in printing.]

APPLICATION FOR REHEARING

NOW COME Plaintiffs-Appellants, Christine Warczak, D. Louis Abood, et al., by and through their attorneys, Webster, Kilcullen & Chamberlain, and Keller, Thoma, Toppin & Schwarze, P.C., and respectfully petition the Court for an Order granting a rehearing. In support of such application, Plaintiffs-Appellants say as follows:

1. The opinion and order filed herein on March 31, 1975 overlooks or misapprehends certain critical points of law which are of major significance to plaintiffs' rights and the jurisprudence of the State of Michigan.

2. In certain important respects the conclusions stated in the opinion and order are in conflict with other decisions of this Court, and decisions of the United States Supreme Court.

3. The opinion and order leaves unanswered several questions respecting the relief, if any, to which appellants may be entitled upon remand of this case to the Circuit Court.

THEREFORE, it is prayed that this Honorable Court enter an Order granting a rehearing in this matter.

Respectfully submitted,

KELLER, THOMA, TOPPIN &
SCHWARZE, P.C.

By: /s/ Dennis B. DuBay
Dennis B. DuBay (P12976)
Attorneys for Plaintiffs-Appellants
1600 City National Bank Building
Detroit, Michigan 48226
(313) 965-7610

Dated: April 18, 1975
Detroit, Michigan

Application for Rehearing or Clarification
[Filed April 18, 1975]

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DIVISION 1

[Title omitted in printing.]

APPLICATION FOR REHEARING OR CLARIFICATION

Now come appellees, by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid, and move for rehearing or clarification, for the following reasons and grounds:

1. Although otherwise denying relief to plaintiffs-appellants, the Court reverses and remands, relative to "the retroactive application given to MCLA 423.210; MSA 17.455(10)."

2. The Court does not state the purpose of the remand.

3. In fact, there is no viable issue on remand, any putative issue having long since been moot and plaintiffs-appellants being without standing to assert any issue respecting retrospective application of the statute.

4. Furthermore, the Court's conclusion that the legislature did not intend (effectively intend?) retrospective application of the statute is erroneous.

5. Other aspects of the opinion, particularly dicta, are erroneous, although the Court's decision otherwise to dismiss plaintiffs-appellants' suit is proper.

This application for rehearing or clarification is based upon the files and records of this cause, upon GCR 1963, 820.4, and upon the affidavit hereunto annexed of Theodore Sachs, one of the attorneys for defendants-appellees.

WHEREFORE, defendants-appellees pray that application for rehearing be granted and/or the decision be clarified, rescinding the remand, and affirming the decision below.

Respectfully submitted,

MARSTON, SACHS, O'CONNELL, NUNN
& FREID

by /s/ Theodore Sachs
Theodore Sachs

Attorneys for defendants-appellees
1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: April 18, 1975.

[Affidavit of Theodore Sachs
omitted in printing.]

Order Denying Rehearing
[Entered May 15, 1975]

AT A SESSION OF THE COURT OF APPEALS OF
THE STATE OF MICHIGAN, Held at the Court of
Appeals in the City of Detroit, on the 15th day of May
in the year of our Lord one thousand nine hundred and
seventy-five.

Present the Honorable
LOUIS D. MCGREGOR,
Presiding Judge
JOHN H. GILLIS,
TIMOTHY C. QUINN,
Judges

[Title omitted in printing.]

In this cause a motion for rehearing having been filed by appellants, and nothing in opposition thereto having been filed by appellees, and a motion for clarification having been filed by appellees, and nothing in opposition thereto having been filed by appellants, and due consideration thereof having been had by the Court.

IT IS ORDERED that the motion for rehearing and the motion for clarification shall be and the same are DENIED.

[Clerk's certificate omitted in printing.]

Application for Leave to Appeal
[Filed June 3, 1975]

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM COURT OF APPEALS

[Title omitted in printing.]

APPLICATION FOR LEAVE TO APPEAL

NOW COMES Christine Warczak, et al and D. Louis Abood, et al by their attorneys, Keller, Thoma, Toppin & Schwarze, P.C. and Webster, Kilcullen & Chamberlain and make application for leave to appeal to this Honorable Court, from a final judgment entered in the Court of Appeals, stating:

1. This is an application for leave to appeal from a Decision of the Michigan Court of Appeals dated March 31, 1975 (Case Nos. 19465 and 19523) reviewing the Opinion, dated November 5, 1973, and the Judgment, entered December 5, 1973, and the Order denying Plaintiffs' Motion for Rehearing, dated January 24, 1974, of the Wayne County Circuit Court (Circuit Court Nos. 155 255 and 145 080).

2. Plaintiffs-Appellants timely filed an Application for Rehearing before the Court of Appeals on April 18, 1975. Defendants-Appellees filed a Motion for Clarification before the Court of Appeals on the same date. On May 15, 1975, the Court of Appeals denied Plaintiffs-

Appellants' Application for Rehearing and Defendants-Appellees' Motion for Clarification.

3. This application is timely filed and is made pursuant to Rule 853 of the Michigan General Court Rules of 1963.

4. A copy of the Decision of the Court of Appeals, dated March 31, 1975, is attached hereto as Appendix "A". A copy of the Order of the Court of Appeals, dated May 15, 1975, denying Plaintiffs-Appellants' Application for Rehearing and Defendants-Appellees' Motion for Clarification is attached hereto as Appendix "B". A copy of the Opinion of the Circuit Court dated November 5, 1973, is attached hereto as Appendix "C". A copy of the Judgment of the Circuit Court dated December 5, 1973, is attached hereto as Appendix "D". A copy of the Order of the Circuit Court, dated January 24, 1974, denying Plaintiffs Motion for Rehearing is attached hereto as Appendix "E".

5. The Plaintiffs-Appellants submit that there is a meritorious basis for this appeal and that their rights under the Constitution of the United States and the Constitution and laws of the State of Michigan will be violated unless that portion of the Decision of the Michigan Court of Appeals, from which leave to appeal is sought, is vacated by this Honorable Court as prayed by Appellants herein.

6. Attached hereto and made a part hereof is a Concise Statement of Proceedings and Facts.

7. This application is accompanied by a Brief in support thereof.

8. BASIS AND GROUNDS FOR APPEAL

8.1 The subject matter of the appeal involves legal principles of major significance to the jurisprudence of

the State. It involves both the constitutionality of an act of the legislature, Public Act 25 of 1973, and the authority of public employers to compel public employees to pay dues or fees to labor organizations as a condition of employment. In earlier granting application for leave to appeal in *Smigel v. Southgate Community School Dist.*, 388 Mich. 531; 202 NW2d 305 (1972), this Court has already recognized the importance of the issue of the permissible limits of collective bargaining agreements in public employment relative to the rights of individual public employees. Indeed, a federal district court is currently abstaining from deciding a constitutional and statutory challenge to another Michigan public sector "agency shop" arrangement in *Holman v. Board of Education*, 388 F. Supp. 792, 799-801 (ED Mich, 1975), pending resolution of the instant cases by the appellate courts of Michigan.

8.2 The decision of the Court of Appeals is clearly erroneous and will cause material injustice. Though holding that the use of funds collected under an "agency shop" arrangement for non-collective bargaining purposes could violate Plaintiff Teachers' constitutional right to freedom of expression and association, the Court of Appeals ruled that the Teachers were not entitled to relief because they had not made a timely objection to use of their "agency fees" for non-collective bargaining purposes. This denial of relief ignored Plaintiffs' specific objections in the complaints to *all* non-collective bargaining expenditures by the Federation. This ruling is expressly contrary to the holding of the United States Supreme Court in *Brotherhood of Railway Clerks v. Allen*, 373 US 113,

118-119 & n 6; 83 S.Ct. 1158, 1162 & n 6; 10 LEd 2d 235, 239-240 & n 6 (1963), that a dissenting employee need not allege and prove each distinct union political expenditure to which he objects, but need only manifest his objection to *any* political expenditures in his complaint. The decision below will cause material injustice in that Plaintiff Teachers must suffer either discharge from their employment or deprivation of their freedom of expression through involuntary payment of "service fees" which the Court of Appeals judicially noticed will be used for purposes other than collective bargaining.

8.3 The Decision of the Court of Appeals is in conflict with decisions of the United States Supreme Court and this Court, and other Court of Appeals' decisions.

(a) Having found that "agency shop" arrangements prospectively authorized by Public Act 25 of 1973 could violate public employees' rights to freedom of expression and association and that the Act could have been more narrowly drawn, the Court of Appeals failed to reach the logical and proper conclusion that the statute is unconstitutional on its face for reason of overbreadth. This result directly conflicts with the well-established rule that a statute capable of unconstitutional application in violation of fundamental freedoms cannot stand. E.g., *NAACP v. Button*, 371 US 415, 432-433; 83 S.Ct. 328, 337-338; 9 LEd 2d 405, 417-418 (1963); *Michigan State UAW Community Action Program Council*, 387 Mich. 506, 198 NW2d 385 (1972), *Sponick v. City of Detroit Police Department*, 49 Mich. App. 162, 179; 211 NW2d 674, 681 (1973).

(b) Although this case involves the question of whether the requirement of payment of agency fees by public employees violates constitutional rights to freedom of speech and association, the Court of Appeals did not apply the tests necessary to justify a governmental intrusion upon fundamental freedoms. This failure of the Court of Appeals clearly collides with the principles: (1) that public employment may not be denied or terminated for reasons which impinge upon freedom of association or speech, see, e.g., *Perry v. Sinderman*, 408 US 593, 597-598; 92 S.Ct. 2694, 2697-2698; 33 LEd 2d 570, 577 (1972) (and cases cited therein); and (2) that governmental action impinging upon the freedom of association or speech is unconstitutional unless it is the least restrictive means necessary to achieve a compelling state interest. See, e.g., *Shelton v. Tucker*, 364 US 479, 485-490; 81 S.Ct. 247, 250-253; 5 LEd 2d 231, 235-238 (1960); *Michigan State UAW Community Action Program Council v. Austin*, 387 Mich. 506, 516-517; 198 NW2d 385, 388-389 (1972).

(c) The Court of Appeals erroneously suggested that a restitutionary remedy would satisfy an infringement on Plaintiff-Appellant Teachers' constitutional rights. This is in conflict with *Cantwell v. Connecticut*, 310 US 296, 60 S.Ct. 900, 84 LEd 1213 (1940) which clearly invalidates any attempted prior restraint of First Amendment rights.

9. This application is based upon the files and records of the above-captioned causes, upon GCR 1963, 853, and upon the Brief in support filed herewith.

10. RELIEF

WHEREFORE, Plaintiffs-Appellants respectfully pray that this Honorable Court enter an Order granting leave to appeal in this matter.

Respectfully submitted,

KELLER, THOMA, TOPPIN &
SCHWARZE, P.C.

By: /s/ Charles E. Keller
Charles E. Keller (P15807)

By: /s/ Dennis B. DuBay
Dennis B. DuBay (P12976)

Attorneys for Plaintiffs-Appellants
1600 City National Bank Building
Detroit, Michigan 48226
(313) 965-7610

WEBSTER, KILCULLEN & CHAMBERLAIN
By: John L. Kilcullen
Attorneys for Plaintiffs-Appellants
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 785-9500

RAYMOND J. LaJEUNESSE, JR.
NATIONAL RIGHT TO WORK LEGAL
DEFENSE FOUNDATION, INC.
Attorney for Plaintiffs-Appellants
8316 Arlington Blvd., Suite 600
Fairfax, Virginia 22030
(703) 573-7010

[Affidavit of counsel and Jurat omitted
in printing.]

[Attachments omitted in printing.]

**Answer to Plaintiffs'-Appellants'
Application for Leave to Appeal**
[Filed July 7, 1975]

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

[Title omitted in printing.]

**ANSWER OF DEFENDANTS-APPELLEES TO
PLAINTIFFS-APPELLANTS' APPLICATION
FOR LEAVE TO APPEAL**

Now come defendants-appellees, The Board of Education of the City of Detroit, Detroit Federation of Teachers, et al., by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid, and in answer and opposition to the Application For Leave to Appeal of plaintiffs-appellants aver:

1. Answering paragraph 1, no answer is required.
2. Answering paragraph 2, defendants-appellees admit the allegations of said paragraph.
3. Answering paragraph 3, defendants-appellees admit the allegations of said paragraph.
4. Answering paragraph 4, defendants-appellees admit the allegations of said paragraph.
5. Answering paragraph 5, defendants-appellees deny said allegations as contrary to law.
6. Answering paragraph 6, defendants-appellees admit the allegations of said paragraph, but deny that said Concise Statement accurately sets forth the Proceedings and Facts below.

7. Answering paragraph 7, defendants-appellees admit the allegations, of said paragraph but deny the validity of the arguments therein contained.

8.1. Answering paragraph 8.1, defendants-appellees deny said allegations as contrary to fact and law.

8.2. Answering paragraph 8.2, defendants-appellees deny said allegations as contrary to fact and law.

8.3. Answering paragraph 8.3, defendants-appellees deny said allegations as contrary to fact and law.

In further answer, defendants-appellees aver that the purported federal constitutional arguments sought to be raised by plaintiffs-appellants have definitively been rejected by the United States Supreme Court and other courts, and that the United States Supreme Court has recently denied plaintiffs-appellants' counsel's applications for certiorari on identical issues in other cases.

WHEREFORE, defendants-appellees pray that said Application for Leave to Appeal of plaintiffs-appellants be denied, together with costs to defendants-appellees.

Respectfully submitted,

MARSTON, SACHS, O'CONNELL,
NUNN & FREID

by /s/ Theodore Sachs

Theodore Sachs (P19827)

Attorneys for defendants-
appellees

1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: July 3, 1975

[Affidavit of counsel and Jurat
omitted in printing.]

**Cross-Application by Defendants-Appellees
for Leave to Appeal**
[Filed July 7, 1975]

STATE OF MICHIGAN

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

[Title omitted in printing.]

**CROSS-APPLICATION BY DEFENDANTS-
APPELLEES FOR LEAVE TO APPEAL AND
FOR PEREMPTORY OR SUMMARY RE-
VERSAL, ON REMAND ISSUE, ONLY**

Now come defendants-appellees, The Board of Education of the City of Detroit, Detroit Federation of Teachers, et al., by their attorneys, Marston, Sachs, O'Connell, Nunn & Freid, and make application for cross-leave to appeal and for peremptory or summary reversal from a final judgment entered in the Court of Appeals, in the manner and for the reasons following:

1. This is an application for cross-leave to appeal from a portion, only, of the decision of the Michigan Court of Appeals dated March 31, 1975 (Case Nos. 19465 and 19523), and the Order Denying Defendants-Appellees' subsequently timely motion for clarification thereof.

2. This cross-application is timely filed and is made pursuant to GCR 1963, 853, including Rule 853.2(5).

3. A copy of the Decision of the Court of Appeals dated March 31, 1975 is attached as Appendix "A" to

the Application for Leave to Appeal of Plaintiffs-Appellants. A copy of the Order of the Court of Appeals dated May 15, 1975, denying defendants-appellees' Motion for Clarification is attached as Appendix "B" to said Application. A copy of the Opinion of the Circuit Court dated November 5, 1973, is attached to said Application as Appendix "C." A copy of the Judgment of the Circuit Court dated December 5, 1973, is attached to said Application as Appendix "D." A copy of the Order of the Circuit Court dated January 24, 1974, denying plaintiffs' Motion For Rehearing is attached to said Application as Appendix "E."

4. Defendants-appellees submit that there is meritorious basis for this cross-appeal and that their rights under the laws of the State of Michigan may be violated unless that portion of the decision of the Michigan Court of Appeals from which cross-leave to appeal is sought, discussed below, is modified by this Honorable Court as prayed by defendants-appellees herein.

5. Attached hereto and made a part hereof is a Concise Statement of Proceedings and Facts.

6. This Cross-Application is accompanied by a Brief in support thereof.

BASIS AND GROUNDS FOR APPEAL

7. Although the Court of Appeals generally agreed with defendants-appellees and found plaintiffs-appellants' complaint to be without merit and subject to dismissal—with which defendants-appellees agree, of

course—the Court reversed and remanded “as to the retroactive application given to MCLA 423.210; MSA 17.455(10).” In fact, said retroactive application “issue” was moot, was not appropriately before the Court of Appeals for disposition, and was not appropriately subject to remand for any purpose affecting the parties to this litigation. Moreover, the Court of Appeals’ disposition of the retrospectivity “issue” was plainly erroneous on the merits, and contrary to the settled principles of this jurisdiction respecting the retrospective effect of remedial and curative legislation. Consequently, the subject matter of this *cross*-appeal—unlike the appeal itself—involves legal principles of major significance to the jurisprudence of the State and is necessary to correct the clearly erroneous decision of the Court of Appeals on *that* issue which may cause material injustice if not corrected.

8. This cross-application is based upon the files and records of this cause, upon GCR 1963, 853, and upon the Brief in Support hereof.

RELIEF

9. Wherefore, defendants-appellees respectfully pray that this Honorable Court enter an order granting this cross-application for leave to appeal, and that it thereupon grant peremptory or summary reversal of the remand portion of the decision *only*, and thereby

reaffirm fully the summary judgment for defendants entered by the Circuit Court.

Respectfully submitted,

MARSTON, SACHS, O'CONNELL,
NUNN & FREID

by /s/ Theodore Sachs

Theodore Sachs

Attorneys for defendants-
appellees

1000 Farmer
Detroit, Michigan 48226
965-3464

DATED: July 3, 1975

[Affidavit of counsel and Jurat
omitted in printing.]

[Attachments omitted in printing.]

**Order Denying Application and
Cross-Application for Leave to Appeal**
[Entered September 7, 1975]

AT A SESSION OF THE SUPREME COURT OF THE
STATE OF MICHIGAN, Held at the Supreme Court
Room, in the City of Lansing, on the 17th day of
September in the year of our Lord one thousand nine
hundred and seventy-five.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
JOHN B. SWAINSON,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER
Associate Justices

[Title omitted in printing.]

On order of the Court, the application for leave to
appeal by plaintiff-appellants is considered and the same
is hereby DENIED because the appellants have failed to
persuade the Court that the questions presented should
be reviewed by this Court.

The application for leave to appeal by defendants-
cross-appellants is also considered and the same is
hereby DENIED because the cross-appellants have failed
to persuade the Court that the questions presented
should be reviewed by this Court.

Swainson, J., not participating.

[Clerk's certificate omitted in printing.]

TABLE OF CONTENTS

| | <i>Page</i> |
|-----------------------------------|-------------|
| Table of Authorities | ii |
| MOTION TO DISMISS OR AFFIRM | 1 |
| ARGUMENT | 2 |
| CONCLUSION | 8 |

TABLE OF AUTHORITIES

| | <i>Page</i> |
|--|-------------|
| <i>Brown v. Allen</i> , 344 U.S. 443 (1953) | 6 |
| <i>Chatham Supermarkets, Inc. v. Ajax Asphalt Paving, Inc.</i> , 370 Mich 334, 121 NW2d 836 (1963) | 7 |
| <i>Copperweld Steel Co. v. Industrial Commission</i> , 324 U.S. 780 (1945) | 6 |
| <i>Cramp v. Board of Public Instruction</i> , 368 U.S. 278 (1961) | 5 |
| <i>Drouillard v. City of Roseville</i> , 9 Mich. App. 239, 156 NW2d 628 (1967) | 7 |
| <i>Edelman v. California</i> , 344 U.S. 357 (1953) | 6 |
| <i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945) | 6 |
| <i>Machinists v. Street</i> , 367 U.S. 740 (1961) | 5 |
| <i>Mellon Co. v. McCafferty</i> , 239 U.S. 134 (1915) | 6 |
| <i>Myers v. Bethlehem Shipbuilding Corporation</i> , 303 U.S. 41 (1938) | 6 |
| <i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968) | 3 |
| <i>Railway Clerks v. Allen</i> , 373 U.S. 113 (1963) | 5, 6 |
| <i>Railway Employees Dept. v. Hanson</i> , 351 U.S. 225 (1956) | 2 |
| <i>United States Civil Service Commission v. National Association of Letter Carriers</i> , 413 U.S. 548 (1973) | 3 |
| <i>Woods v. Nierstheimer</i> , 328 U.S. 211 (1946) | 6 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, et al,
Plaintiffs-Appellants,

v.

DETROIT BOARD OF EDUCATION, DETROIT
FEDERATION OF TEACHERS et al.,
Defendants-Appellees

CHRISTINE WARCZAK, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY
OF DETROIT, DETROIT FEDERATION OF
TEACHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellees Board of Education of the City of Detroit and Detroit Federation of Teachers, et al., move, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed, or in the alternative that the judgment below be affirmed, on the ground that the appeal presents no substantial federal question.

**COUNTER-STATEMENT OF QUESTIONS
PRESENTED BY THE APPEAL**

1. Does a state statute which permits a public employer such as the Detroit Board of Education to enter into a collective bargaining agreement with a union of the city's teachers requiring as a condition of employment that all employees in the bargaining unit pay the union a service fee equivalent to dues, violate the First and Fourteenth Amendments of the United States Constitution?

2. In upholding a constitutional right against compelled support of union expenditures for political causes, including a remedy of personal proportional refunds, did the Michigan Court of Appeals err in holding that teachers must specifically protest to the union the alleged political expenditures to which they object as a condition of obtaining restitution?

Since both questions must be answered in the negative under settled precedents of this Court, this appeal should be dismissed for want of a substantial federal question or the judgment below summarily affirmed.

ARGUMENT

1. Appellants first assert that a state statute authorizing a public employer and a union of public employees to enter into a collective bargaining agreement to require all members of the bargaining unit to pay a service fee to the union equivalent to dues violates the First and Fourteenth Amendments. But this claim cannot stand in the face of *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956); indeed, the decision below follows *a fortiori* from *Hanson*.

This Court held in *Hanson* "that the requirement for financial support of the collective-bargaining agency by all who received the benefits of its work is within the power

of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments" (at p. 238). Certainly the authority of a state to set terms and conditions of employment for *its* employees is greater than the authority of Congress to regulate the employment conditions of private employees; this is especially true where, as in the Railway Labor Act upheld in *Hanson*, Congress overruled a state policy against any form of dues or service fee requirements. The policy judgment of the Michigan Legislature that those in public employ who benefit from representation by a collective-bargaining agent should pay therefor, is entitled to at least the respect accorded the Congressional judgment concerning the railway industry sustained in *Hanson*. "[T]he question is one of policy with which the judiciary has no concern" (351 U.S. at 234). While appellants would distinguish *Hanson* on the ground that this case involves the "fundamental freedoms of public employees" (Jurisdictional Statement, p. 17, emphasis in original), if anything, there may be fewer constitutional limitations on government when it acts in the capacity of employer, than in other contexts. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 564 (1973). Furthermore, although *Hanson* involved the private sector, this Court there presupposed that "governmental action" was involved as the predicate for its reaching and rejecting the First Amendment contentions similarly urged in that case. 351 U.S. 225, 232.

Appellants' only argument against *Hanson's* applicability to the case at bar seems to be: "Public sector unions such as the Federation are involved in a 'collective bargaining' process inextricably connected to the formulation of

governmental policy regarding the provision of public services, budgeting, and taxation—political activity by any reasonable definition of the term” (Jurisdictional Statement, p. 16). But, from the point of view of the union and the employees it represents, collective bargaining remains the process by which the union seeks improved wages and working conditions for the benefit of all employees in the bargaining unit. Far from being “political,” that process is a close approximation of the collective-bargaining system as it operates in the private sector. To put it another way, the process of settling employment conditions through collective bargaining is not transmuted from economic into “political” activity merely because the employer is a public body rather than a private party. The budgetary and tax consequences of an agreement between a union and a public employer are not constitutionally distinguishable from the consequences of an agreement reached between a union and a private employer whose customers include governmental bodies, and the bargaining situation before the Michigan Court of Appeals is indistinguishable from that in *Hanson*.

2. Equally lacking in substance is appellants’ attack on the ruling below on the protesters’ right to recover that part of their fees which might be expended for political causes.¹ Strangely, appellants would treat the ruling below as a rejection of the dissenters’ rights with respect to political expenditures, whereas in fact the ruling below *squarely upholds those rights*. Thus, the Court of Appeals’ opinion makes clear (Jurisdictional Statement, pp. 18a-21a) that—because the Michigan statute did not provide for the political expenditures exception which this Court’s

¹ As we show below (n. 4), appellants in fact have never paid any agency fees.

decision in *Machinists v. Street*, 367 U.S. 740 (1961), found implicit in the Railway Labor Act—the statute “could violate plaintiffs’ First and Fourteenth Amendment rights” (19a). To avoid such violation, the Michigan Court goes on to discuss the alternative remedies suggested in the *Street* opinion, and states its approval of “restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed” (21a). The right to such restitution is upheld by the Michigan Court in the following explicit terms:

“To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.”² (21a).

² Appellants argue that the Michigan statute, even as above construed to assure that objecting public employees need not support political activities with which they disagree, is unconstitutionally overbroad (Jurisdictional Statement, pp. 24-27). But this contention is nothing more than a reformulation of the freedom of association argument advanced and rejected in *Hanson*. The point established by *Hanson*, *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), is that a statute which provides for required dues or fees payments is constitutional so long as employees who give proper notice of their objection are personally relieved of the obligation to finance political activities with which they disagree; but that they are not entitled to interfere with dues or fees obligations, or with expenditures, generally. That is exactly how the Michigan courts have interpreted the Michigan statute and the construction of that statute by the state courts is dispositive. “We accept without question [the state court’s] view of the statute’s meaning, as of course we must. [The] authoritative interpretation by the [State] Supreme Court ‘puts these words in the statute as definitely as if it had been so amended by the legislature.’” *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285 (1961).

Thus the Michigan courts have fully vindicated the right of public employees to restitution of the political expenditures to which appropriate objection is made, and this is all appellants can ask. Certainly, their belated effort to challenge the ruling of the court below that an employee must make his objection known to the union before he can obtain judicial restitution raises no substantial federal question or indeed any federal question whatever.³ While this Court in *Railway Clerks v. Allen*, 373 U.S. 113 (1963), treated the judicial complaint as an adequate protest in federal statutory litigation (373 U.S. at 119, notes 5 and 6), it nowhere gave any intimation that state courts could not require protests directly to the union as a prerequisite to invocation of their judicial machinery or that it in any way intended to cast doubt upon "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51 (1938). Appellants, like other state court litigants, must pursue their remedies in the manner that state law prescribes for the vindication of their rights and no federal question is raised in the absence of such pursuit. See, e.g., *Mellon Co. v. McCafferty*, 239 U.S. 134 (1915); *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Copperweld Steel Co. v. Industrial Commission*, 324 U.S. 780 (1945); *Woods v. Nierstheimer*, 328 U.S. 211 (1946); *Edelman v. California*, 344 U.S. 357 (1953); *Brown v. Allen*, 344 U.S. 443 (1953). Furthermore, there can be no damage to appellants in

³ Actually, appellants' complaints did not seek restitution of the amounts allegedly spent by the union for political causes as provided by *Street* and *Allen*, but rather sought to avoid their entire fees obligation in direct contradiction of this Court's ruling in *Hanson*.

following the state procedure of making known to the union the political causes to which they object; as to appellants, the collective bargaining agreement is not yet in force and the union has collected no service fees from appellants.⁴ The record is barren of any suggestion that once service fee payments do commence, the union would not make full restitution, in accordance with the decision below, to the appellants of any funds expended for such causes.

⁴ Appellants' complaint was filed before any collective bargaining contract containing an agency shop clause went into effect. Subsequently, appellants—or, more accurately, the very few of them still remaining who have not long since voluntarily become members of the appellee Federation—avoided paying any agency shop fees by virtue of a contract clause, still honored by appellee Board, which stayed their obligation to do so pending litigation.

Furthermore, the record is devoid of any alleged objectionable expenditures by appellee union, these cases having been decided on motions for summary relief below. In that regard, appellants' "offer of proof," mentioned at pp. 7-8, n. 2, of their Jurisdictional Statement, was properly rejected by the trial court under local practice and is not part of the record here, *Chatham Supermarkets, Inc. v. Ajax Asphalt Paving, Inc.*, 370 Mich. 334, 341, 121 NW2d 836 (1963); *Drouillard v. City of Roseville*, 9 Mich. App. 239, 244, 156 NW2d 628 (1967).

CONCLUSION

Since the Michigan Court of Appeals has followed this Court's decision in *Hanson* and has provided a remedy of restitution of political expenditures in line with *Street* and *Allen*, it is respectfully submitted that the appeal should be dismissed for want of a substantial federal question or the judgment below summarily affirmed.

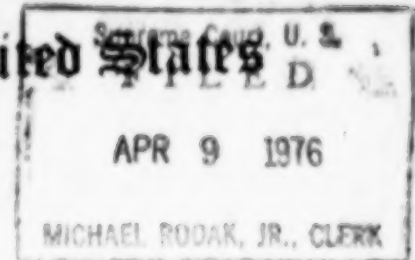
Respectfully submitted,
THEODORE SACHS
Marston, Sachs, Nunn, Kates,
Kadushin & O'Hare
1000 Farmer
Detroit, Michigan 48226
313-965-3464
Attorney for Appellees

March 30, 1976

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153



D. LOUIS ABOOD, *et al.*,

Appellants.

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants.

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

**APPELLANTS' BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM**

Of Counsel:

KELLER, THOMA, TOPPIN
& SCHWARZE, P.C.
Detroit, Michigan

RAYMOND J. LAJEUNESSE, JR.
Fairfax, Virginia

JOHN L. KILCULLEN

Webster, Kilcullen & Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Appellants

April 9, 1976

TABLE OF CONTENTS

| | <i>Page</i> |
|------------------|-------------|
| ARGUMENT | 2 |
| CONCLUSION | 8 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|-----|
| A.F.S.C.M.E. v. Woodward, 406 F.2d 137 (8th Cir. 1969) | 2,4 |
| Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) | 6 |
| Alton R.R. v. Illinois Commerce Commission, 305 U.S. 548 (1939) | 8 |
| Andrews v. Louisville & N. R.R., 406 U.S. 320 (1972) | 3 |
| Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) | 2 |
| Bieski v. Wolverine Insurance Co., 379 Mich. 280, 150 N.W. 2d 788 (1967) | 7 |
| Cafeteria Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961) | 3 |
| Carter v. Texas, 177 U.S. 442 (1900) | 6 |
| Cort v. Ash, 422 U.S. 66 (1975) | 7 |
| Evans v. Newton, 382 U.S. 296 (1966) | 3 |
| First National Bank v. Anderson, 269 U.S. 341 (1926) | 6 |
| Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) | 3 |
| Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975) | 3 |
| International Association of Machinists v. Street, 367 U.S. 740 (1961) | 6,8 |
| Keyishian v. Board of Regents, 385 U.S. 589 (1967) | 2,4 |
| Lovell v. City of Griffin, 303 U.S. 444 (1938) | 6 |

| | |
|---|-------|
| McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) | 2 |
| Monaghan v. Central Vt. Ry., 404 F. Supp. 683 (D. Mass. 1975) | 3 |
| Pickering v. Board of Education, 391 U.S. 563 (1968) | 2,4 |
| Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) | 2-4,8 |
| Schuh v. Schuh, 368 Mich. 568, 118 N.W. 2d 694 (1962) | 7 |
| Street v. New York, 394 U.S. 576 (1969) | 6 |
| <i>Constitutional Provisions:</i> | |
| Constitution of the United States, First Amendment | 2-3,6 |
| <i>Other Authorities:</i> | |
| Anderson, <i>Strikes and Impasse Resolution in Public Employment</i> , 67 Mich. L. Rev. 943 (1969) | 4-5 |
| Project, <i>Collective Bargaining and Politics in Public Employment</i> (pt. 4), 19 U.C.L.A. L. Rev. 887 (1972) | 5 |
| D. Stanley, <i>Managing Local Government Under Union Pressure</i> (1972) | 4 |
| Summers, <i>Public Employee Bargaining: A Political Perspective</i> , 83 Yale L.J. 1156 (1974) | 4 |
| H. Wellington & R. Winter, <i>The Unions and the Cities</i> (1971) | 4 |

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants.

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants.

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

**APPELLANTS' BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM**

While Appellant Teachers' position on the merits is adequately set forth in our Jurisdictional Statement, we think it desirable to reply briefly to Appellees' assertion that this appeal lacks a substantial federal question.

ARGUMENT

1. Appellees assert that this appeal lacks a substantial federal question because the claim here is indistinguishable from that in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). To state that proposition is not to demonstrate it.

The state statute upheld by the Michigan Court of Appeals against federal constitutional challenge expressly authorizes state agencies to force public employees to make financial contributions to unions as a condition of public employment. The ruling law is that *public employment* is constitutionally protected against employment practices which abridge First Amendment rights of speech and association. *E.g.*, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). These precedents have been uniformly understood by the federal courts to mean that no state or local government may by either statute or administrative action discharge a public employee because he has seen fit to join a union.¹ *E.g.*, *A.F.S.C.M.E. v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969).

All of these cases stand for the same proposition: conditioning public employment on a waiver by the employee of his right of free association is unconstitu-

¹ If the right of free association is abridged when a public employee is discharged for joining a union, parity of reasoning requires that discharging him for refusing to join or to contribute financial support to a union be regarded as an equal abridgment. Jurisdictional Statement at 18-19.

tional. *But this is the law only in the public sector.* A private employer has a common law right to discharge its employees at will. *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 324 (1972); *Monaghan v. Central Vt. Ry.*, 404 F. Supp. 683, 686 (D. Mass. 1975). Ever since its decision in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), where this Court was unanimous on the point, see 245 U.S. at 271-72 (Brandeis, Holmes & Clarke, JJ., dissenting), it has been understood that private employment — in the absence of positive state action — may constitutionally be conditioned upon waivers by employees of their speech and associational rights. “[I]t is black letter law that purely private restrictions on the right of free speech are not prohibited in many circumstances where the First Amendment would forbid similar interference by the Government.” *Holodnak v. Avco Corp.*, 514 F.2d 285, 292 (2d Cir. 1975).

Thus, there is nothing novel about the *Hanson* ruling, *insofar as it is confined to the private sector.* It merely established that, on the bare record before the Court, there was nothing unconstitutional in a federal statute authorizing private employers to condition *private* employment on a waiver of the right not to associate with a labor union — a condition which private employers could constitutionally impose at common law. *Hitchman*, 245 U.S. at 250-51.

However, “the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.” *Cafeteria Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961); cf. *Evans v. Newton*, 382 U.S. 296, 298-300 (1966). The basic error made by the Michigan Court of

Appeals is that it extended the *Hanson* ruling to the public sector, where it conflicts with the more recent rulings of this Court and of the inferior federal courts concerning the constitutional rights of public employees. This Court must pass in a plenary way on the decision of the Michigan Court of Appeals because that decision completely ignored the implications of *Pickering*, *Keyishian*, *A.F.S.C.M.E. v. Woodward*, etc. Indeed, the Court of Appeals did not see fit even to mention these later decisions despite their importance and their relevance. Instead, it erroneously chose to rely exclusively on *Hanson* — as do Appellees for their Motion to Dismiss or Affirm — a case of no relevance whatsoever to the constitutional rights of public employees or to the constitutional limitations upon government employers.

Appellees further assert that *Hanson* is applicable here because for constitutional purposes public sector collective bargaining is indistinguishable from private sector collective bargaining. Yet they cite absolutely no authority for their argument that bargaining in the public sector is not a political process. Appellees apparently would have this Court overlook the body of scholarly and judicial opinion which, with rare unanimity, views “collective bargaining” by public employees as “an integral part of the political process, a procedure for reaching a political decision,” Summers, *Public Employee Bargaining: A Political Perspective*, 83 *Yale L.J.* 1156, 1197 (1974). See the cases and other authorities cited in the Jurisdictional Statement at 16-17. Appellants also call the Court’s attention to, e.g., D. Stanley, *Managing Local Government Under Union Pressure* 1, 20, 24 (1972); H. Wellington & R. Winter, *The Unions and the Cities* 21-30 (1971); Anderson,

Strikes and Impasse Resolution in Public Employment, 67 *Mich. L. Rev.* 943, 953-54 (1969); Project, *Collective Bargaining and Politics in Public Employment* (pt. 4), 19 *U.C.L.A. L. Rev.* 887, 1010, 1011-1019 (1972).

2. Appellees read the decision of the Court of Appeals as construing the Michigan statute “to assure that objecting public employees need not support political activities with which they disagree***,” Motion to Dismiss or Affirm at 5 & n.2, and conclude that therefore Appellants’ challenge to the statute on the ground that it permits the use of nonunion employees’ coerced fees for political and other noncollective bargaining purposes does not raise a substantial federal question. This gloss is amazing in view of the Michigan Court’s clear holding that the statute “does not limit the nonmember’s contribution to his proportionate share of the costs of collective bargaining, [and] sanctions the use of nonunion members’ fees for purposes other than collective bargaining.” 230 N.W. 2d at 326 (App. A at 18a) (emphasis added). The Court below did not read any right to object to political spending or administrative “restitutionary remedy” into the statute, it merely discussed *in dicta* possible judicial remedies for constitutional violations which it erroneously held Appellants could not assert due to a purported *lack of standing*. *Id.* at 327 (App. A at 20a-21a). This error raises a substantial federal question for the reasons stated in the Jurisdictional Statement at 20-27.

Appellees are also wide of the mark in suggesting that the decision below was grounded upon the view that Appellant Teachers had not pursued a remedy afforded by state law for the vindication of their

federal constitutional rights. The Court of Appeals' holding that in order to preserve First Amendment rights a public employee must plead that he has specifically protested to the union the expenditure of his funds for political purposes to which he objects was based, not on any Michigan constitutional, statutory, administrative or judicial rule of law, but on that Court's (erroneous) reading of *International Association of Machinists v. Street*, 367 U.S. 740 (1961).² See 230 N.W. 2d at 327 (App. A at 19a-21a). Nor do Appellees point to any such state rule. In any case, "[t]he issue whether a federal question was sufficiently and properly raised in the state courts is *itself* ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969) (emphasis added); accord, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525 (1959); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *First National Bank v. Anderson*, 269 U.S. 341, 345-46 (1926); *Carter v. Texas*, 177 U.S. 442, 447 (1900).

Finally, Appellees' assertion that there could be no damage to Appellants in requiring them to follow the Court of Appeals' suggested "restitutionary remedy" is without merit. If the decision of the Court below is not reversed, Appellant Teachers would have to make "service fee" payments, or suffer discharge, and make known to the union the political causes to which they

² Appellees' reference to a "belated effort" to challenge this holding is puzzling in view of the fact that Appellants have maintained that it was erroneous at all stages of the proceedings below. See, e.g., Brief in Support of Application for Rehearing at 5-14 (Mich. Ct. App., Apr. 18, 1975); Application for Leave to Appeal at 4-5 (Mich. Sup. Ct., Jun. 3, 1975).

object, and only *then* seek restitution *from the union itself* "of any funds expended for such causes." Motion to Dismiss or Affirm at 7 (emphasis added).³ Once Appellants' coerced funds have been expended for political causes, the harm done is *irreparable*. See *Cort v. Ash*, 422 U.S. 66, —, 95 S. Ct. 2080, 2091 (1975).

³ In point of fact, Appellants' Complaint in *Abood* was filed *after* the "agency shop" clause went into effect. The *Abood* plaintiffs alleged that Appellee Detroit Federation of Teachers had requested their discharge and that Appellee Board of Education had threatened them with discharge. *Abood* Complaint, Count I ¶¶12-13. Under the duress and misrepresentations of repeated threats of discharge from the Board and Federation, certain of the Appellant Teachers later involuntarily paid "service fees" under protest in the belief that such payments were necessary to maintain their employment. Supplemental Memorandum in Opposition to the Federation's Suggestion of Partial Mootness at 4-9, and attached Affidavits (Mich. Ct. App., Sept. 17, 1974).

Furthermore, regardless of the status of Appellants' offer of proof (which Appellants do not concede is outside the record here), the Complaints alleged that the Federation spends a substantial portion of the monies collected under the "agency shop" clause on noncollective bargaining matters of which Appellants do not approve. *Abood* Complaint, Count II ¶4; *Warczak* Amended Complaint ¶13. The well-settled Michigan rule is that on an appeal of a dismissal for failure to state a cause of action all factual allegations in the complaint are assumed to be true and viewed in the light most favorable to the plaintiffs. *Bieski v. Wolverine Insurance Co.*, 379 Mich. 280, 150 N.W. 2d 788 (1967); *Schuh v. Schuh*, 368 Mich. 568, 118 N.W. 2d 694 (1962). In any case, here the Court of Appeals judicially noticed that a portion of every union's budget is spent on political activities. 230 N.W. 2d at 326 (App. A at 18a).

CONCLUSION

As demonstrated in the Jurisdictional Statement, the issues presented on this appeal have not, as Appellees assert, been disposed of by the *Hanson* and *Street* cases. In any event, this Court has consistently held that an appellee's motion to dismiss an appeal or affirm the judgment on the ground that the question has been settled by prior decisions of this Court will be denied where the question presented "is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring any further consideration." *Alton R.R. v. Illinois Commerce Commission*, 305 U.S. 548, 550 (1939). Accordingly, it is respectfully submitted that the Motion to Affirm or Dismiss should be denied and that probable jurisdiction should be noted.

Respectfully submitted,

JOHN L. KILCULLEN

Webster, Kilcullen & Chamberlain
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorney for Appellants

Of Counsel:

KELLER, THOMA, TOPPIN & SCHWARZE, P.C.
Detroit, Michigan

RAYMOND J. LaJEUNESSE, JR.
Fairfax, Virginia

April 9, 1976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE APPELLANTS

SYLVESTER PETRO
2841 Fairmont Road
Winston-Salem, North Carolina 27106
Attorney for Appellants

July 10, 1976.

(continued)

Of Counsel:

JOHN L. KILCULLEN

Kilcullen, Smith & Heenan
1800 M Street, N.W., Suite 600
Washington, D.C. 20036

DENNIS B. DUBAY

Keller, Thoma, Toppin
& Schwarze, P.C.
1600 City National Bank Building
Detroit, Michigan 48226

RAYMOND J. LaJEUNESSE, JR.

National Right To Work Legal
Defense Foundation
8316 Arlington Boulevard, Suite 600
Fairfax, Virginia 22038

EDWIN VIEIRA, JR.

12408 Greenhill Drive
Silver Spring, Maryland 20904

TABLE OF CONTENTS

| | <i>Page</i> |
|---|-------------|
| TABLE OF AUTHORITIES CITED | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED .. | 2 |
| QUESTIONS PRESENTED | 4 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF THE ARGUMENT | 7 |
| ARGUMENT | 10 |
| I. Conditioning public employment on a surrender of First-Amendment rights is unconstitutional on its face, hence in compelling them to associate with the Union by providing financial support to its political and economic activities, the Board and the State of Michigan abridged the Teachers' constitutional rights | 10 |
| A. Unlike private employment, public employment may not be conditioned upon a waiver or surrender of constitutional rights | 11 |
| 1. Private employers are at liberty under the Constitution to condition offers of employment on either membership or nonmembership in any private association, including labor organizations ... | 13 |
| 2. Restrained as they are by the Constitution, governments may not condition public employ- ment or other public benefits upon a cession of constitutional rights, either directly by legislation or indirectly by administrative action | 15 |
| B. The requirement of financial support to the Union as a condition of their public employment infringes the Teachers' freedom of speech and their political and associational rights under the First and Fourteenth Amendments | 18 |

(ii)

| | Page |
|---|------|
| 1. Under color of the Michigan PERA, the Board has required the Teachers to pay full dues or fees to the Union as a condition of employment, with no limit upon the uses to which it may put those dues or fees | 18 |
| 2. Ruling principles developed in this Court, the uniform course of relevant decisions in the inferior federal courts, and the plain purpose of the First Amendment all dictate the conclusion that the state-action here challenged abridges the Teachers' freedoms of association, speech, and political autonomy | 21 |
| 3. Since public-sector collective bargaining is inherently and unalterably political in character, and since the court below found that the Michigan PERA authorizes the Union to finance political activities with funds exacted from the Teachers, compelling the unwilling Teachers to pay dues and fees to the Union constitutes an <i>a fortiori</i> abridgment of their First-Amendment rights | 62 |
| II. The agency-shop is a direct and broadly based attack on the Teachers' associational autonomy which not only finds no warrant in any substantial or legitimate state interest, but also frustrates achievement of the state's compelling duties to protect the values inherent in academic freedom, to preserve a genuinely representative government, and to prevent any impairment of governmental sovereignty | 81 |
| A. The agency-shop scheme is a direct attempt to suppress the Teachers' First- and Fourteenth-Amendment freedoms as such for the benefit of the Union..... | 83 |

(iii)

| | Page |
|--|------|
| 1. By requiring them financially to support the Union, the agency-shop scheme abridges, rather than merely "regulates", "limits", or "infringes" the Teachers' First- and Fourteenth-Amendment freedoms | 85 |
| 2. The agency-shop scheme compels the Teachers to advance the private interests of the Union at the expense of their own First- and Fourteenth-Amendment freedoms | 99 |
| B. Neither the appellees, nor the Michigan Legislature, nor the Court of Appeals has put forward either a substantial or even a legitimate state interest in support of the agency-shop scheme | 115 |
| 1. Those supporting the agency-shop scheme have the burden of disproving its repugnance to the First and Fourteenth Amendments with clear and convincing evidence | 117 |
| 2. Rather than constituting disproof of the unconstitutionality of the agency-shop scheme, the statements of the Michigan Legislature and the Court of Appeals establish its repugnance to the First and Fourteenth Amendments | 120 |
| 3. The Teachers would pose no danger to the orderly and efficient provision of public services if their freedom to refuse to contribute financial support to the Union were recognized and protected. | 128 |
| C. On its face, the agency-shop scheme is an overbroad extension of the exclusive-representation device which enhances the ability of the Union to suppress the Teachers' academic freedom, to exercise disproportionate political power at the expense of all other citizens, and to usurp prerogatives of sovereignty from the state | 147 |

1. Even without the agency-shop, compulsory public-sector collective bargaining permits unions acting as exclusive representatives to exercise extraordinary authority over public employees and extraordinary influence upon the formulation of public-employment policy 150
 2. As an instrument for compelling political and ideological conformity among teachers, the agency-shop is incompatible with academic freedom 153
 3. As an instrument for financing the Union's political and ideological activism, the agency-shop is incompatible with representative government 164
 4. As an instrument for transferring the loyalties of public employees from their employer to the Union, the agency-shop is incompatible with governmental sovereignty 176
- III. The equivocal treatment of *Hanson* by the court below served only to confuse the issues. To the limited extent that *Hanson*, a private-sector case, is at all relevant here, it is suggestive authority in favor of the Teachers because it broadly intimated that forcing even private-sector employees financially to support political activities to which they were opposed would be unconstitutional 187
- A. *Hanson* would be incompatible with the unconstitutional-conditions principle if applied to public employment, and should therefore either be distinguished from this case, overruled, or held superseded by subsequent constitutional development 189
 - B. *Hanson* need not be overruled since it may be distinguished as a pre-emption case which merely confirmed the common-law privilege of private employers to condition employment at will 191

- C. *Hanson* is authority in favor of the Teachers insofar as it suggests that compelling even private-sector employees unwillingly to support a union's political and ideological activities would invade their rights under the First Amendment; and despite its apparent holding to the contrary, the Michigan Court of Appeals agreed with this contention 195
- IV. The Teachers had standing to sue, and the injunctive relief they sought was in all respects appropriate 199
- A. *Street* and *Allen*, the authorities relied upon below to deny the Teachers standing to sue and any right to injunctive relief, were statutory interpretations, not constitutional adjudications, and hence not controlling here; moreover, the court below misinterpreted those cases, holding them authority against the Teachers when actually they favor the Teachers' claims 200
 1. As statutory interpretations, *Street* and *Allen* could not have disposed of the Teachers' claims, either procedurally or substantively, because those claims are constitutional in character, as the court below itself held 201
 2. *Street* and *Allen* both held that objections to the improper use of compelled dues were timely if made for the first time in the complaint 202
 3. Contrary to the holding below, infringements of First-Amendment rights are peculiarly subject to injunctive relief, and *Street* so implied 203
 - B. Constitutional doctrine applied by this Court in the overbreadth and prior-restraint cases establishes the Teachers' standing to challenge the constitutionality of the agency-shop scheme 206
 - C. Injunctive relief is particularly appropriate to remedy the irreparable harm which the agency-shop scheme necessarily causes 211

| | Page |
|------------------|------|
| CONCLUSION | 214 |

Either the decision below should be reversed and the PERA agency-shop declared unconstitutional on its face as an abridgment of the Teachers' freedoms of speech, association, and political autonomy; or the case should be remanded with a direction that the Teachers be given an opportunity to prove the invasion of their civil liberties that they have alleged 214

TABLE OF AUTHORITIES CITED

Cases

| | |
|---|----------------|
| Adair v. United States, 208 U.S. 161 (1908) | 14 |
| Adams v. United States <i>ex rel.</i> McCann, 317 U.S. 269 (1942) | 41 |
| Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) | 12 |
| Alabama Education Ass'n v. Wallace, 362 F. Supp. 682 (M.D. Ala. 1973) | 135 |
| Allee v. Medrano, 416 U.S. 802 (1974) | 211-12 |
| Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), <i>cert.</i> <i>denied</i> , 404 U.S. 1020 (1972) | 38 |
| American Fed'n of State, County, & Municipal Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971) | 39 |
| American Fed'n of State, County, & Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969) | 35-37 |
| American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) | 146 |
| American Steel Foundries v. Tri-City C.T. Council, 257 U.S. 184 (1921) | 144 |
| Andrews v. Louisville & N.R.R., 406 U.S. 320 (1972) | 13 |
| Aptheker v. Secretary of State, 378 U.S. 500 (1964) | 119 |
| Arizona Flame Restaurant, Inc. v. Baldwin, 34 L.R.R.M. 2707 (Ariz. Super. Ct. 1954), <i>aff'd as modified on</i> <i>other grounds</i> , 82 Ariz. 385, 313 P.2d 759 (1975) | 106 |
| Ashton v. Kentucky, 384 U.S. 195 (1966) | 139 |
| Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) | 14, 35-37, 101 |

| | Page |
|---|--|
| Attorney General v. Detroit Bd. of Educ., 154 Mich. 584, 118 N.W. 606 (1908) | 21 |
| Attorney General v. Loweey, 131 Mich. 639, 92 N.W. 289 (1902) .. | 21 |
| Baggett v. Bullitt, 377 U.S. 360 (1964) | 113, 212 |
| Baird v. State Bar, 401 U.S. 1 (1971) | 29, 135-36 |
| Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) | 117 |
| Bateman v. South Carolina State Ports Authority, 298 F. Supp. 999 (D.S.C. 1969) | 36 |
| Bates v. City of Little Rock, 361 U.S. 516 (1960) | 28, 82, 84, 117-18, 120 |
| Bielski v. Wolverine Insurance Co., 379 Mich. 280, 150 N.W.2d 788 (1967) | 5, 63 |
| Bigelow v. Virginia, 421 U.S. 809 (1975) | 208 |
| Bishop v. Wood, 44 U.S.L.W. 4820 (U.S. Jun. 10, 1976) | 33, 135 |
| Block v. Hirsh, 256 U.S. 135 (1921) | 121 |
| Board of Educ. v. Barnette, 319 U.S. 624 (1943) ... | 16-17, 35, 42, 44, 50-51, 54, 59, 61, 86, 93, 95-96, 98, 100, 117, 140 |
| Board of Educ. v. Detroit Fed'n of Teachers, 55 Mich. App. 499, 223 N.W.2d 23 (1974) | 142 |
| Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) | 183 |
| Board of Educ. v. Taylor Fed'n of Teachers, 66 Mich. App. 695, 239 N.W.2d 713 (1976) | 142 |
| Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., ____ U.S. ____, 96 S. Ct. 1817 (1976) | 42, 49, 55 |
| Board of Regents v. Roth, 408 U.S. 564 (1972) | 16, 189 |
| Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973) ... | 48 |
| Borden's Farm Products Co. v. Baldwin, 293 U.S. 194 (1934) ... | 120 |
| Booster Lodge No. 405, Machinists v. NLRB, 412 U.S. 84 (1973) .. | 45 |
| Branzburg v. Hayes, 408 U.S. 665 (1972) | 170 |
| Bridges v. California, 314 U.S. 252 (1941) | 93, 118 |

| | <i>Page</i> |
|--|-------------------------------------|
| Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) | 60 |
| Broadrick v. Oklahoma, 413 U.S. 601 (1973) | 25, 114, 172, 173 |
| Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963). .. | 79, 188, 195, 198, 202-03, 205, 208 |
| Brown v. Louisiana, 383 U.S. 131 (1966) | 84 |
| Buchanan v. Warley, 245 U.S. 60 (1917) | 145 |
| Buckley v. Valeo, ____ U.S. ____, 96 S. Ct. 612 (1976) | 31, 48, 100, 171 |
| Bullock v. Carter, 405 U.S. 134 (1972) | 167 |
| Burns v. Elrod, 509 F.2d 1133 (7th Cir.), <i>cert. granted</i> , 423 U.S. 821 (1975) | 38, 213 |
| Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) .. | 12, 193 |
| Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961) | 17, 24-25, 31, 192 |
| Cain v. United States, 73 F. Supp. 1019 (N.D. Ill. 1947) | 103 |
| Calo v. Paine, 521 F.2d 411 (2d Cir. 1975) | 38 |
| Cantwell v. Connecticut, 310 U.S. 296 (1940) | 84, 92, 214 |
| Carrington v. Rash, 380 U.S. 89 (1965) | 167 |
| Carroll v. Princess Anne County, 393 U.S. 175 (1968) | 117 |
| Carter v. Carter Coal Co., 298 U.S. 238 (1936) | 60-61, 126 |
| Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) | 12 |
| Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) | 139 |
| Chapman v. Gerard, 341 F. Supp. 1170 (D.V.I. 1970), <i>aff'd</i> , 456 F.2d 577 (3d Cir. 1972) | 103 |
| Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972) | 86 |
| Cipriano v. City of Houma, 395 U.S. 701 (1969) | 167 |
| Citizens' Savings & Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall.) 655 (1875) | 85, 111 |
| City of Charlotte v. Local 660, Firefighters, 44 U.S.L.W. 4801 (U.S. Jun. 7, 1976) | 23, 61, 100 |
| City of Cleveland v. Motor Coach Employees, Division 268, 90 N.E.2d 711 (Ohio C.P. 1949) | 183-84 |

| | <i>Page</i> |
|--|----------------------|
| City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm'n, <i>prob. juris. noted</i> , ____ U.S. ____, 96 S. Ct. 1408 (1976) | 102, 159-60 |
| City of New York v. DeLury, 23 N.Y.2d 175, 295 N.Y.S.2d 901, 243 N.E.2d 128 (1968), <i>appeal dismissed</i> , 394 U.S. 455 (1969) | 184 |
| City of Pawtucket v. Teachers, Local 930, 87 R.I. 364, 141 A.2d 624 (1958) | 184 |
| City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947) | 38, 59, 180 |
| Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) | 25, 114, 172-75 |
| Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), <i>cert. denied</i> , 350 U.S. 1006 (1956) | 212 |
| Coates v. City of Cincinnati, 402 U.S. 611 (1971) | 84, 139, 209 |
| Cohen v. California, 403 U.S. 15 (1971) | 86, 92, 139 |
| Cole v. City of La Grange, 113 U.S. 1 (1885) | 111 |
| Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) | 11 |
| Confederation of Police v. City of Chicago, 382 F. Supp. 624 (N.D. Ill. 1974) | 101 |
| Cooper v. Aaron, 358 U.S. 1 (1958) | 12 |
| Coppage v. Kansas, 236 U.S. 1 (1915) | 14, 112, 186 |
| Corrigan v. Buckley, 271 U.S. 323 (1926) | 11 |
| Cort v. Ash, 422 U.S. 66 (1975) | 91, 98, 214 |
| Cox v. Louisiana, 379 U.S. 536 (1965) | 84, 139 |
| Crowther v. Ross Chemical & Mfg. Co., 42 Mich. App. 426, 202 N.W.2d 577 (1972) | 5, 119 |
| Cramp v. Board of Public Instruc., 368 U.S. 278 (1961) | 16, 25, 30, 113, 207 |
| Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) | 17 |
| Curran v. Galen, 152 N.Y. 33, 46 N.E. 297 (1897) | 13 |
| Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972) | 32 |
| DeGregory v. Attorney General, 383 U.S. 825 (1966) | 102, 117 |

(x)

| | <i>Page</i> |
|---|------------------|
| De Jonge v. Oregon, 299 U.S. 353 (1937) | 28-29 |
| Dent v. West Virginia, 129 U.S. 114 (1889) | 17 |
| Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973) | 135 |
| Dombrowski v. Pfister, 380 U.S. 479 (1965) | 201, 209, 211-12 |
| Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561 (1975) | 209 |
| Douglas v. Noble, 261 U.S. 165 (1923) | 17 |
| Dunn v. Blumstein, 405 U.S. 330 (1972) | 84, 167 |
| Edwards v. South Carolina, 372 U.S. 229 (1963) | 84 |
| Evans v. Abney, 396 U.S. 435 (1970) | 12 |
| Evans v. Newton, 382 U.S. 296 (1966) | 12, 60 |
| Everson v. Board of Educ., 330 U.S. 1 (1947) | 42, 121 |
| Faretta v. California, 422 U.S. 806 (1975) | 42, 96, 98 |
| Farrigan v. Helsby, 68 Misc. 2d 952, 327 N.Y.S.2d 909 (Sup. Ct. 1971), <i>aff'd</i> , 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973) | 108 |
| Ficek v. Boilermakers, Local 647, 219 N.W.2d 860 (N.D. 1974) . . . | 106 |
| Firefighters, Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975) | 66 |
| Firefighters, Local 2340 v. Willis, 400 F. Supp. 1097 (N.D. Ill. 1975) | 36 |
| First Unitarian Church v. County of Los Angeles, 357 U.S. 545 (1958) | 16 |
| Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), <i>aff'd</i> , 476 F.2d 375 (8th Cir. 1973) | 134 |
| Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) | 12 |
| 414 Theater Corp. v. Murphy, 499 F.2d 1155 (2d Cir. 1974) | 211 |

(xi)

| | <i>Page</i> |
|--|-------------------------|
| Frain v. Baron, 307 F. Supp. 27 (E.D.N.Y. 1969) | 135 |
| Freedman v. Maryland, 380 U.S. 51 (1965) | 117, 210 |
| Fuentes v. Shevin, 407 U.S. 67 (1972) | 12 |
| Gardner v. Broderick, 392 U.S. 273 (1968) | 124 |
| Garner v. Teamsters, Local 776, 346 U.S. 485 (1953) | 194 |
| Garrison v. Louisiana, 379 U.S. 64 (1964) | 96 |
| Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974) | 140 |
| Gibson v. Florida Legis. Invest. Comm., 372 U.S. 539 (1963) . . . | 84, 102, 117-18, 138 |
| Gideon v. Wainwright, 372 U.S. 335 (1963) | 16 |
| Good v. Associated Students, 86 Wash. 2d 94, 542 P.2d 762 (1975) | 44 |
| Gooding v. Wilson, 405 U.S. 518 (1972) | 84, 209 |
| Gordon v. Lance, 403 U.S. 1 (1971) | 100 |
| Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir. 1975) | 140 |
| Grayned v. City of Rockford, 408 U.S. 104 (1972) | 209 |
| Gregory v. City of Chicago, 394 U.S. 111 (1969) | 118 |
| Grosjean v. American Press Co., 297 U.S. 233 (1936) | 43, 84, 86 |
| Guards, Local 1 v. Wackenhut Services, Inc., 90 Nev. 198, 522 P.2d 1010 (1974) | 106 |
| Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947) . . . | 180 |
| Hague v. CIO, 307 U.S. 496 (1939) | 213 |
| Hanover v. Northrop, 325 F. Supp. 170 (D. Conn. 1970) | 133 |
| Hanover Township Fed'n of Teachers v. Hanover Com- munity School Corp., 318 F. Supp. 757 (N.D. Ind. 1970), <i>aff'd</i> , 457 F.2d 456 (7th Cir. 1972) | 14, 35, 101 |
| Harper v. Board of Elections, 383 U.S. 663 (1966) | 167 |
| Healy v. James, 408 U.S. 169 (1972) | 30-31, 140 |
| Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1945) . . | 103 |
| Henry v. Greenville Airport Comm'n, 284 F.2d 631 (4th Cir. 1960) | 212 |

| | |
|---|--|
| Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456, <i>cert. denied</i> , 368 U.S. 829 (1961) | 106 |
| Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) | 13-14, 151 |
| Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 44 U.S.L.W. 4864 (U.S. Jun. 17, 1976) | 65, 74-75 |
| Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569 (7th Cir. 1975), <i>cert. denied</i> , 44 U.S.L.W. 3622 (U.S. May 4, 1976) | 133 |
| Hudgens v. NLRB, ____ U.S. ____, 96 S. Ct. 1029 (1976) | 11-12 |
| Hunter v. Erickson, 393 U.S. 385 (1969) | 112, 166 |
| Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972), <i>cert. denied</i> , 410 U.S. 928, 943 (1973) ... | 38, 135 |
| Indiana State Employees Ass'n v. Negley, 501 F.2d 1239 (7th Cir. 1974) | 38 |
| International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) | 44 |
| International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) | 19, 48-49, 79, 93, 188, 195-205, 208, 211 |
| Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905) | 13 |
| James v. Board of Educ., 461 F.2d 566 (2d Cir.), <i>cert.</i> <i>denied</i> , 409 U.S. 1042 (1972) | 133, 135 |
| James v. Bowman, 190 U.S. 127 (1903) | 12 |
| James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944) | 13 |
| James v. Valtierra, 402 U.S. 137 (1971) | 12 |
| Jennings v. Meridian Municipal Separate School Dist., 337 F. Supp. 576 (S.D. Miss. 1970), <i>aff'd</i> , 453 F.2d 413 (5th Cir. 1971) | 133 |
| J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) | 151 |
| Jones v. Opelika, 316 U.S. 584 (1942), <i>on rehearing</i> , 319 U.S. 103 (1943) | 210 |

| | |
|---|--|
| Jones v. SEC, 298 U.S. 1 (1936) | 97 |
| Katz v. McAuley, 438 F.2d 1058 (2d Cir. 1971), <i>cert.</i> <i>denied</i> , 405 U.S. 933 (1972) | 211 |
| Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) | 211 |
| Keyishian v. Board of Regents, 385 U.S. 589 (1967) .. | 16, 25, 27, 35, 37, 80, 113, 119, 155-56, 189-90, 209 |
| Kingsley Int'l Pictures Corp. v. Regents of N.Y. Univ., 360 U.S. 684 (1959) | 101 |
| Knight v. Minnesota Community College Faculty Ass'n, No. 4-74 Civ. 659 (D. Minn., filed Dec. 19, 1974), <i>petition</i> <i>for mandamus granted sub nom. Knight v. Alsop</i> , No. 76-1051 (8th Cir. May 17, 1976) | 102, 195 |
| Kunz v. New York, 340 U.S. 290 (1951) | 92 |
| Kusper v. Pontikes, 414 U.S. 51 (1973) | 96, 167 |
| Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975), <i>petition for cert. filed</i> , 44 U.S.L.W. 3351 (U.S. Nov. 12, 1975) (No. 75-698) | 142 |
| Lathrop v. Donohue, 367 U.S. 820 (1961) | 44, 47, 51-53, 55-56, 126, 149, 175, 190 |
| Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) | 25, 55 |
| Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) | 212 |
| Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) | 14, 100 |
| Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir.), <i>cert.</i> <i>denied</i> , 404 U.S. 872 (1971) | 45 |
| Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emig., 113 U.S. 33 (1885) | 101 |
| Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) | 12 |
| Local 794, Firefighters v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972) | 101 |
| Locke v. Vance, 307 F. Supp. 439 (S.D. Tex. 1969) | 212 |
| Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973) | 35, 101 |

| | |
|---|---------------------------------------|
| Louisiana <i>ex rel.</i> Gremillion v. NAACP, 366 U.S. 293 (1961) | 29, 119 |
| Lovell v. City of Griffin, 303 U.S. 444 (1938) | 92, 119, 210 |
| Lubin v. Panish, 415 U.S. 709 (1974) | 167 |
| Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964) | 100 |
| Lusk v. Estes, 361 F. Supp. 653 (N.D. Tex. 1973) | 134 |
| McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) | 24-25 |
| McCray v. United States, 195 U.S. 27 (1904) | 85 |
| McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) | 35-37 |
| Marlin Rockwell Corp., 114 N.L.R.B. 553 (1955) | 44 |
| Marsh v. Alabama, 326 U.S. 501 (1946) | 12 |
| Martin v. Smith, 239 Wis. 314, 1 N.W.2d 163 (1941) | 103 |
| Meek v. Pittinger, 421 U.S. 349 (1975) | 212 |
| Meiland v. Cody, 359 Mich. 78, 101 N.W.2d 336 (1960) | 103 |
| Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971) | 35 |
| Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) | 103 |
| Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) | 11, 15, 43, 86 |
| Mills v. Alabama, 384 U.S. 214 (1966) | 112 |
| Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) | 12, 17 |
| NAACP v. Alabama <i>ex rel.</i> Patterson, 357 U.S. 449 (1958) | 29, 36, 82, 117, 138 |
| NAACP v. Button, 371 U.S. 415 (1963) | 29, 55, 82, 86, 112, 118-19, 138, 208 |
| National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), <i>appeal dismissed per stipulations</i> , 400 U.S. 801 (1970) | 35 |
| NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) | 44, 59 |
| NLRB v. Boeing Co., 412 U.S. 92 (1973) | 44 |
| NLRB v. General Motors Corp., 373 U.S. 734 (1963) | 44-45, 106 |

| | |
|---|----------|
| NLRB v. Granite State Joint Bd., 409 U.S. 213 (1972) | 45 |
| NLRB v. Insurance Agents, 361 U.S. 477 (1960) | 56, 146 |
| NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1973) | 151 |
| National League of Cities v. Usery, 44 U.S.L.W. 4974 (U.S. Jun. 24, 1976) | 75-76 |
| National Protective Ass'n v. Cummings, 170 N.Y. 315, 63 N.E. 369 (1902) | 13 |
| National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969) | 201 |
| Near v. Minnesota <i>ex rel.</i> Olson, 283 U.S. 697 (1931) | 112 |
| Nebbia v. New York, 291 U.S. 502 (1934) | 17 |
| New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Authority, 117 N.J. Super. 349, 284 A.2d 566 (Ch. 1971), <i>aff'd</i> , 123 N.J. Super. 461, 303 A.2d 599 (App. Div. 1973), <i>aff'd</i> , 64 N.J. 579, 319 A.2d 224 (1974) | 108-09 |
| New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co., 115 U.S. 650 (1885) | 116 |
| New York Times Co. v. Sullivan, 376 U.S. 254 (1964) | 112 |
| Niemotko v. Maryland, 340 U.S. 268 (1951) | 92 |
| Nixon v. Condon, 286 U.S. 73 (1932) | 12 |
| Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951) | 180, 183 |
| Oil Workers Int'l Union v. Mobil Oil Corp., 44 U.S.L.W. 4842 (U.S. Jun. 14, 1976) | 107 |
| Old Dominion Branch No. 496, Letter Carriers v. Austin, 418 U.S. 264 (1974) | 141 |
| <i>In re</i> Olson, 211 Minn. 114, 300 N.W. 398 (1941) | 104 |
| Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) | 122, 151 |
| Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) | 102, 117 |

| | <i>Page</i> |
|--|------------------------|
| Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970) | 35 |
| Panhandle Eastern Pipe Line Co. v. Highway Comm'n, 294 U.S. 613 (1935) | 116 |
| Papish v. Board of Curators, 410 U.S. 667 (1973) | 140 |
| Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908) | 13 |
| Patton v. United States, 281 U.S. 276 (1930) | 41, 116 |
| Pennsylvania <i>ex rel.</i> Rafferty v. Philadelphia Psy. Center, 356 F. Supp. 500 (E.D. Pa. 1973) | 134 |
| Pennsylvania Labor Rel. Bd. v. State College Area School Dist., — Pa. —, 337 A.2d 262 (1975) | 76 |
| Pennsylvania Labor Rel. Bd. v. Uniontown Area School Dist., — Pa. D. & C. 2d —, 357 A.2d — (C.P., Fayette Cty., No. 737, May 20, 1976) | 33 |
| Perez v. Board of Police Commissioners, 78 Cal. App. 2d 638, 178 P.2d 537 (1947) | 37, 131 |
| Perry v. Sindermann, 408 U.S. 593 (1972) | 24-25, 27, 30, 35, 189 |
| Pickering v. Board of Educ., 391 U.S. 563 (1968) .. 25, 27, 31, 35-36, 79-80, 96, 113-14, 132, 135-38, 156, 189-90, 209 | |
| Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909) | 13 |
| Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n, 413 U.S. 376 (1973) | 42 |
| Plant v. Woods, 176 Mass. 492 (1902) | 56 |
| Police Officers' Guild v. Washington, 369 F. Supp. 543 (D.D.C. 1973) | 36 |
| Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.), <i>aff'd</i> <i>mem.</i> , 393 U.S. 14 (1968) | 48 |
| Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), <i>aff'd mem.</i> , 417 U.S. 961 (1974) | 212 |
| Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) | 12, 193 |
| A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) | 211 |

| | <i>Page</i> |
|--|-------------------|
| Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) .. 20, 22, 47, 51, 79, 131, 145-46, 187-201 | |
| Railway Mail Ass'n v. Murphy, 180 Misc. 868 (N.Y. Sup. Ct. 1943) | 38, 59, 184 |
| Reitman v. Mulkey, 387 U.S. 369 (1967) | 12 |
| Retail Clerks, Local 1625 v. Schermerhorn, 373 U.S. 746 (1963) | 77, 106 |
| Reynolds v. Sims, 377 U.S. 533 (1964) | 167 |
| Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975), <i>cert. denied</i> , — U.S. —, 96 S. Ct. 1147 (1976) | 95 |
| Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) | 119 |
| Roth v. United States, 354 U.S. 476 (1957) | 112 |
| Rowan v. Post Office Dep't, 397 U.S. 728 (1970) | 97 |
| Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), <i>cert. denied</i> , 411 U.S. 932 (1973) | 93 |
| San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) | 194 |
| A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) | 121, 126 |
| Schermerhorn v. Local 1625, Retail Clerks, 141 So. 2d 269 (Fla. 1962), <i>aff'd</i> , 373 U.S. 746, <i>on rehearing</i> , 375 U.S. 96 (1963) | 106 |
| Schneider v. Smith, 390 U.S. 17 (1968) | 84, 97 |
| Schneider v. Town of Irvington, 308 U.S. 147 (1939) | 119, 121 |
| Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969) | 211 |
| Schobert v. Inter-County Drainage Bd., 342 Mich. 270, 69 N.W.2d 814 (1955) | 103 |
| Schuh v. Schuh, 368 Mich. 568, 118 N.W.2d 694 (1962) | 63 |
| Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) | 17, 30, 32, 55 |
| Scofield v. NLRB, 394 U.S. 423 (1969) | 44 |
| Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970) | 90, 213 |

| | Page |
|---|----------------------------|
| <i>Ex parte</i> Secombe, 60 U.S. (19 How.) 9 (1857) | 17 |
| Service Employees Int'l Union v. County of Butler, 306 F. Supp. 1080 (W.D. Pa. 1969) | 36 |
| Shapiro v. Thompson, 394 U.S. 618 (1969) | 84 |
| Shakman v. Democratic Organ. of Cook County, 435 F.2d 267 (7th Cir. 1970), <i>cert. denied</i> , 402 U.S. 909 (1971) | 38 |
| Shelley v. Kraemer, 334 U.S. 1 (1948) | 12, 100 |
| Shelton v. Tucker, 364 U.S. 479 (1960) | 28, 48, 113, 118, 155, 209 |
| Sherbert v. Verner, 374 U.S. 398 (1963) | 16, 24-26, 82, 98, 118 |
| Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969), <i>cert.</i> <i>denied</i> , 396 U.S. 1040 (1970) | 211 |
| Shinsky v. O'Neil, 232 Mass. 99, 121 N.E. 790 (1919) | 13 |
| Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) | 210 |
| Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) | 17, 25, 31 |
| Smigel v. Southgate Community School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972) | 6, 77, 107-08 |
| Smith v. Allwright, 321 U.S. 649 (1944) | 12, 60 |
| Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966) | 132 |
| Smith v. Bowen, 232 Mass. 106, 121 N.E. 814 (1919) | 13 |
| Smith v. Goguen, 415 U.S. 566 (1974) | 43 |
| Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), <i>cert.</i> <i>denied</i> , 417 U.S. 908 (1974) | 135 |
| Smith v. United States, 502 F.2d 512 (5th Cir. 1974) | 133, 135 |
| Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969) | 209 |
| South Wales Miners' Fed'n v. Glamorgan Coal Co., [1905] A.C. 239 [House of Lords] | 13 |
| Speiser v. Randall, 357 U.S. 513 (1958) | 25-26, 28, 50, 89, 90 |
| Spence v. Washington, 418 U.S. 405 (1974) | 139 |
| Spevack v. Klein, 385 U.S. 511 (1967) | 55 |
| State v. Lofthus, 45 N.D. 357, 177 N.W. 755 (1920) | 104 |
| State v. Nemaha Cty., 7 Kan. 549 (1871) | 101 |
| Staub v. City of Baxley, 355 U.S. 313 (1958) | 92, 210 |

| | Page |
|--|------------------|
| Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) | 59 |
| Stillwell v. Detroit Fed'n of Teachers, 88 L.R.R.M. 2266 (Mich. Cir. Ct., Wayne Cty., 1974) | 142 |
| <i>In re</i> Stolar, 401 U.S. 23 (1971) | 30, 84 |
| Street v. New York, 394 U.S. 576 (1969) | 93, 139 |
| Street Elec. Ry. Employees, Div. 1255 v. Las Vegas- Tonopah-Reno Stage Lines, Inc., 319 F.2d 783 (9th Cir. 1963) | 106 |
| Sweezy v. New Hampshire, 354 U.S. 234 (1957) | 29, 112, 156 |
| Talton v. Mayes, 163 U.S. 376 (1896) | 11 |
| Talley v. California, 362 U.S. 60 (1960) | 119 |
| Teamsters, Local 594 v. City of West Point, 338 F. Supp. 927 (D. Neb. 1972) | 36 |
| Terminiello v. City of Chicago, 337 U.S. 1 (1949) | 139, 147 |
| Terry v. Adams, 345 U.S. 461 (1953) | 12, 60, 193 |
| Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930) | 14 |
| Thomas v. Collins, 323 U.S. 516 (1945) | 82, 84, 117, 118 |
| Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55 (1937) | 111 |
| Thornhill v. Alabama, 310 U.S. 88 (1940) | 138, 144, 210 |
| Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) | 135, 139 |
| Torcaso v. Watkins, 367 U.S. 488 (1961) | 25, 27, 33, 42 |
| Traux v. Raich, 239 U.S. 33 (1915) | 13 |
| Tyson & Brother v. Banton, 273 U.S. 418 (1927) | 121 |
| Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949) | 44 |
| United Public Workers v. Mitchell, 330 U.S. 75 (1947) | 27, 165, 207 |
| United States v. Butler, 297 U.S. 1 (1936) | 111 |
| United States v. Carolene Products Co., 304 U.S. 144 (1938) | 120 |

| | <i>Page</i> |
|---|---------------------------------|
| United States v. CIO, 335 U.S. 106 (1948) | 117 |
| United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868) | 103 |
| United States v. O'Brien, 391 U.S. 367 (1968) | 30, 81-83, 87 |
| United States v. Robel, 389 U.S. 258 (1967) | 30, 84, 116, 119, 190 |
| United States v. United States Steel Corp., 251 U.S. 417 (1920) | 121 |
| United Transp. Union v. Michigan Bar, 401 U.S. 576 (1971) | 30 |
| Van Zandt v. McKee, 202 F.2d 490 (5th Cir. 1953) | 14 |
| Virginia v. Rives, 100 U.S. 313 (1880) | 11 |
| Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) | 151 |
| Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo.), <i>aff'd</i> <i>mem.</i> , 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976) | 36, 101, 206 |
| Washington v. Davis, 44 U.S.L.W. 4789 (U.S. Jun. 7, 1976) | 22, 32-33, 80, 190 |
| Watkins v. United States, 354 U.S. 178 (1957) | 17 |
| Watson v. City of Memphis, 373 U.S. 526 (1963) | 145 |
| Wetzel v. McNutt, 4 F. Supp. 233 (S.D. Ind. 1933) | 103 |
| Whitney v. California, 274 U.S. 357 (1927) | 92 |
| Wieman v. Updegraff, 344 U.S. 183 (1952) | 17, 26, 29, 154-55, 158, 189 |
| Williams v. Quill, 277 N.Y. 1, 12 N.E.2d 547, <i>appeal</i> <i>dismissed</i> , 303 U.S. 621 (1938) | 13 |
| Williams v. Rhodes, 393 U.S. 23 (1968) | 167 |
| Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950), <i>aff'd mem.</i> , 340 U.S. 909 (1951) | 212 |
| Winston-Salem/Forsyth County Unit, Educators Ass'n v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974) | 76, 104, 169 |
| Withers v. Buckley, 61 U.S. (20 How.) 84 (1858) | 11 |
| Wolff v. Selective Service Local Bd., 372 F.2d 817 (2d Cir. 1967) | 211 |

| | <i>Page</i> |
|--|--|
| Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), <i>aff'd</i> , 275 U.S. 503 (1927) | 103 |
| Yick Wo v. Hopkins, 118 U.S. 356 (1886) | 17 |
| Younger v. Harris, 401 U.S. 37 (1971) | 213 |
| <i>United States Constitution</i> | |
| Preamble | 165 |
| First Amendment | 5-6, 10, 16-18, 22, 26, 28-30, 33-34, 37-38, 46-49, 51-52, 55-56, 58, 63-64, 79-80, 82-87, 89-90, 92-95, 102, 111-20, 126-27, 132-35, 137-40, 144, 146-47, 149, 153, 155-56, 172-74, 186-89, 194-96, 199, 201-02, 204-09, 211-12 |
| Sixth Amendment | 16, 41, 96 |
| Fourteenth Amendment | 5, 10-11, 16-18, 23, 29, 34, 37, 46, 52, 57, 63-64, 80, 83-85, 89-90, 92-95, 102, 111-13, 115-18, 120, 126-27, 132, 135, 137, 139-40, 144, 147, 149, 153, 155-56, 186, 189, 209, 212 |
| <i>Constitutional Provisions, Statutes, and Court Rules</i> | |
| Alaska Stat. §23.40.110(b)(1-2) (1975) | 129 |
| Ariz. Att'y Gen. Op. No. 62-2, 49 L.R.R.M. 107 (1961) | 106 |
| Cal. Gov't Code §3546 (West Supp. 1976) | 129 |
| Conn. Gen. Stat. Ann. §31-105(5) (1972) | 129 |
| Del. declaration of rights (1776) | 165 |
| Exec. Order 11,491, 5 U.S.C.A. §7301 (Supp. 1976) | 130 |
| Fed. R. Civ. P. 12(b)(6) | 5 |
| Hawaii Rev. Stat. (Supp. 1976), §89-3 | 129 |
| §89-4 | 129 |
| 12 Hening's Va. Stat | 50 |
| Ky. Rev. Stat. Ann. § 345.050(1)(c) (Supp. 1974) | 129 |
| Md. Const. (1776) | 165 |
| Mass. Const. (1780) | 165 |

| | Page |
|--|--|
| Mass. Gen. Laws Ann. ch. 150E, §12 (Supp. 1975) | 129 |
| Mich. Const. art. VIII, §2 | 21 |
| Mich. Gen. Ct. R. 117.2(1) | 5 |
| Michigan Public Employment Relations Act (1975 rev.), | |
| §17.455(1) | 57 |
| §17.455(2) | 142 |
| §17.455(10) | 18-20, 34, 57, 101, 107, 121, 125, 127, 129, 136, 148, 159, 207, 210, 213 |
| §17.455(11-14) | 57, 151 |
| §17.455 (15) | 57, 153 |
| Minn. Stat. Ann. §179.65, subd. 2 (Supp. 1976) | 129 |
| Mont. Rev. Codes Ann. §59.1605(c) (Supp. 1976) | 129 |
| National Labor Relations Act, | |
| §8(a)(3), 29 U.S.C. §158(a)(3) (1970) | 45, 131 |
| §14(b), 29 U.S.C. §164(b) (1970) | 131 |
| N.H. Const. (1784) | 165 |
| N.J. Stat. Ann. §34:13A-5.3 (1974 Cum. Supp.) | 108 |
| N.Y. Civ. Serv. Law §202 (McKinney 1973) | 108 |
| Ore. Rev. Stat. (1974), | |
| §243.666(1) | 129 |
| §243.762(c) | 129 |
| Pa. Const. (1776) | 165 |
| Railway Labor Act §2, Eleventh, 45 U.S.C. §152, Eleventh (1970) | 19, 131, 187, 189, 197, 201, 204 |
| R.I. Gen Laws Ann. §26-11-2 (Supp. 1975) | 129 |
| S.D. Att'y Gen. Op. 221 (Jul. 8, 1958) | 106 |
| Tex. Att'y Gen. Op. WW-1018 (Mar. 14, 1961) | 106 |
| Vt. Const. (1777) | 165 |
| Vt. Stat. Ann. tit. 21 (Supp. 1975), | |
| §1722(a)(1) | 129 |
| §1726(a)(8) | 129 |

| | Page |
|--|------|
| Va. Const. (1776) | 165 |
| Wash. Rev. Code (Supp. 1975), | |
| §28B.16.100 | 129 |
| §41.56.122 | 129 |
| W. Va. Code Ann. §21-1A-4(a)(3) (rep. vol. 1973) | 129 |
| Wis. Stat. (1974), | |
| §111.70(1)(h) | 129 |
| §111.70(2) | 129 |
| §111.81 (6) | 129 |
| §111.84(1)(f) | 129 |

Miscellaneous

| | |
|--|-----|
| H. Alexander, <i>Financing the 1968 Election</i> (1971) | 175 |
| <i>AFT in the News</i> | 78 |
| Annotation, "The Supreme Court and the First Amendment Right of Association", 33 L.Ed.2d 865 (1973) | 28 |
| Barkan, "Political Activities of Labor", 1 <i>Issues in Industrial Society</i> (1969) | 63 |
| B. Barry, <i>Political Argument</i> (1965) | 166 |
| R.L. Bish & V. Ostrom, <i>Understanding Urban Government</i> (1973) | 161 |
| Blair, "Union Security Agreements in Public Employment", 60 <i>Corn. L. Rev.</i> 183 (1975) | 72 |
| D. Bok & J. Dunlop, <i>Labor and the American Community</i> (1970) | 65 |
| Boynton, "Industrial Collective Bargaining in the Public Sector: Because It's There?", 21 <i>Catholic L. Rev.</i> 568 (1972) | 183 |
| I. Brant, <i>Madison, The Nationalist</i> (1948) | 50 |
| R. J. Braun, <i>Teachers and Power</i> (1972) | 161 |
| Bureau of Labor Statistics, Division of Industrial Relations, "Work Stoppages in Government 1974" | 122 |

| | Page |
|--|----------------|
| Bureau of National Affairs, <i>Daily Labor Report</i> | 73, 77 |
| Bureau of National Affairs, <i>Government Employee Relations Report</i> | 72-73, 77, 122 |
| Burke & Reber, "State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment", 46 <i>So. Cal. L. Rev.</i> 1003 (1973) | 12 |
| Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 <i>Yale L.J.</i> 418 (1970) | 72, 170 |
| 2 Z. Chafee, <i>Government and Mass Communications</i> (1947) | 43 |
| Clark, "Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem", 44 <i>Cinn. L. Rev.</i> 680 (1975) | 72, 77 |
| Comment, "A Constitutional Analysis of the Spoils System—the Judiciary Visits Patronage Place", 57 <i>Iowa L. Rev.</i> 1320 (1972) | 38 |
| Comment, "Patronage Dismissals: Constitutional Limits and Political Justifications", 41 <i>U. Chi. L. Rev.</i> 297 (1974) | 38 |
| CCH Lab. L. Rep., State Laws, ¶47,000 <i>et seq.</i> | 129 |
| 6A <i>Corbin on Contracts</i> (1962) | 13 |
| Council for Better Education, Sept. 1972 | 163 |
| Cox, "Foreword: Constitutional Adjudications and the Promotion of Human Rights", 80 <i>Harv. L. Rev.</i> 91 (1966) | 12 |
| E.D. Cronon, <i>The Political Thought of Woodrow Wilson</i> (1965) | 16 |
| M.E. Dimock & G.O. Dimock, <i>Public Administration</i> (4th ed. 1969) | 65 |
| Dunlop, "The Function of the Strike", in Dunlop & Chamberlain, eds., <i>Frontiers of Collective Bargaining</i> (1967) | 69 |
| Emerson, "Freedom of Association and Freedom of Expression", 74 <i>Yale L.J.</i> 1 (1964) | 30 |
| Fellman, "Constitutional Rights of Association", in Kurland, ed., <i>Free Speech and Association: The Supreme Court and the First Amendment</i> (1975) | 30, 72 |

| | Page |
|--|--------------------|
| Fleming, "Collective Bargaining Revisited", in Dunlop & Chamberlain, eds., <i>Frontiers of Collective Bargaining</i> (1967) | 72 |
| K. Hanslowe, <i>The Emerging Law of Labor Relations in Public Employment</i> (1967) | 65, 170 |
| Hildebrand, "The Public Sector", in Dunlop & Chamberlain, eds., <i>Frontiers of Collective Bargaining</i> (1967) | 68 |
| W.N. Hohfeld, <i>Fundamental Legal Conceptions as Applied in Judicial Reasoning</i> (Yale Press ed. 1923) | 12, 24 |
| R. Horton, <i>Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years</i> (1973) | 65-66, 74 |
| Kheel, "Strikes and Public Employment", 67 <i>Mich. L. Rev.</i> 931 (1969) | 182 |
| Klaus, "The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History", 67 <i>Mich. L. Rev.</i> 1033 (1969) | 72 |
| Lewis, "The Meaning of State Action", 60 <i>Col. L. Rev.</i> 1083 (1960) | 12 |
| J. Locke, <i>Second Treatise on Government</i> (P. Laslett ed. 1960) | 145, 165, 178, 182 |
| Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 <i>Ind. Rel.</i> 18 (1972) | 72, 105, 169 |
| II <i>Writings of James Madison</i> (Hunt ed. 1901) | 50 |
| H. Maine, <i>Popular Government</i> (1885) | 179 |
| Meiklejohn, "The First Amendment is an Absolute", in Kurland, ed., <i>Free Speech and Association: The Supreme Court and the First Amendment</i> (1975) | 16 |
| L. von Mises, <i>Human Action</i> (3d rev. ed. 1966) | 180 |
| Montana, "Striking Teachers, Welfare, Transit and Sanitation Workers", 19 <i>Lab. L.J.</i> 273 (1968) | 182 |
| C. Morris, <i>The Developing Labor Law</i> (1971) | 106 |
| F.C. Mosher, <i>Democracy and the Public Service</i> (1968) | 32, 65 |
| M.H. Moskow, J.J. Loewenberg & E.C. Koziara, <i>Collective Bargaining in Public Employment</i> (1970) | 65 |

| | Page |
|---|--------------|
| Mulcahy & Schweppe, "Strikes, Picketing and Job Actions by Public Employees", 59 <i>Marq. L. Rev.</i> 113 (1976) | 143 |
| <i>The New York Times</i> | 74, 162, 175 |
| Note, 24 <i>Va. L. Rev.</i> 567 (1938) | 13 |
| O'Neill, "Politics, Patronage, and Public Employment", 44 <i>Cinn. L. Rev.</i> 725 (1975) | 38 |
| S. Perlman, <i>A Theory of the Labor Movement</i> (1928) | 122 |
| N. Polsby, <i>Community Power and Political Theory</i> (1963) | 164 |
| Port Umpqua Educ. Ass'n Request for "Fair Share" Determination, Oregon PERB No. C-275 (Jan. 17, 1975) | 160 |
| Project, "Collective Bargaining and Politics in Public Employment", 19 <i>U.C.L.A.L. Rev.</i> 887 (1972) | 72, 110 |
| Rehmus, "Constraints on Local Governments in Public Employee Bargaining", 67 <i>Mich. L. Rev.</i> 919 (1969) | 77 |
| C. Rice, <i>Freedom of Association</i> (1962) | 30, 44 |
| Siegal & Kainen, "Political Forces in Public Sector Collective Bargaining", 21 <i>Catholic L. Rev.</i> 581 (1972) | 72 |
| Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis", 67 <i>Mich. L. Rev.</i> 891 (1969) | 185 |
| 2 A.I. Solzhenitsyn, <i>The Gulag Archipelago, 1918-1956</i> (T.P. Whitney transl. 1975) | 99 |
| S.D. Spero & J.M. Capozzola, <i>The Urban Community and Its Unionized Bureaucracies: Pressure Politics in Local Government Labor Relations</i> (1973) | 65 |
| O.G. Stahl, <i>Public Personnel Administration</i> (6th ed. 1971) | 32, 65 |
| D.T. Stanley, <i>Managing Local Government Under Union Pressure</i> (1972) | 65 |
| J. Steiber, <i>Public Employee Unionism</i> (1973) | 65 |
| Summers, "Union Powers and Workers' Rights", 49 <i>Mich. L. Rev.</i> 805 (1951) | 152 |

| | Page |
|---|------------------|
| Summers, "Public Employee Bargaining: A Political Perspective", 83 <i>Yale L.J.</i> 1156 (1974) | 72, 74, 104, 168 |
| Summers, "Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 <i>Cinn. L. Rev.</i> 669 (1975) | 69 |
| L. Teller, <i>Labor Disputes and Collective Bargaining</i> (1940) | 13 |
| <i>The Times-Union</i> | 78 |
| Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law", 81 <i>Harv. L. Rev.</i> 1439 (1968) | 25 |
| <i>The Village Voice</i> | 162 |
| <i>The Wall Street Journal</i> | 74 |
| K.O. Warner & M.L. Hennessy, <i>Public Management at the Bargaining Table</i> (1967) | 65 |
| George Washington, Farewell Address | 15 |
| <i>Webster's New Int'l Dictionary</i> (2d ed. unabg. 1934) | 130 |
| Wechsler, "Toward Neutral Principles of Constitutional Law", 73 <i>Harv. L. Rev.</i> 1 (1959) | 12 |
| J. Weitzman, <i>The Scope of Bargaining in Public Employment</i> (1975) | 65 |
| Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 <i>Yale L.J.</i> 1107 (1969) | 183 |
| Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 <i>Yale L.J.</i> 805 (1970) | 72, 163, 183 |
| H. Wellington & R. Winter, <i>The Unions and the Cities</i> (1971) | 65 |
| Witmer, "Collective Labor Agreements in the Courts", 48 <i>Yale L.J.</i> 195 (1938) | 13 |
| Wollett, "The Coming Revolution in Public School Management", 67 <i>Mich. L. Rev.</i> 1017 (1969) | 182 |

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,
v. *Appellants.*

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

CHRISTINE WARCZAK, *et al.*,
v. *Appellants.*

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the Circuit Court for Wayne County, Michigan (A. 72-74), is unofficially reported at 84 L.R.R.M. 3008. The opinion of the Michigan Court of Appeals (A. 94-104) is reported at 60 Mich. App. 92, 230 N.W.2d 322.

An earlier opinion of the Circuit Court (A. 29-34) is unofficially reported at 73 L.R.R.M. 2237, 61 CCH Lab. Cas. ¶ 52,225. The opinions of the Supreme Court of Michigan in a related case, pursuant to which the earlier summary judgment in favor of appellees herein was vacated, are reported at 388 Mich. 531, 202 N.W.2d 305.

JURISDICTION

The judgment of the Court of Appeals of Michigan (A. 104-06) was entered on March 31, 1975. Appellants' application for rehearing was denied by the Court of Appeals on May 15, 1975 (A. 111). The Supreme Court of Michigan denied their application for leave to appeal by orders entered on September 17, 1975 (A. 124). The Notice of Appeal to this Court was filed on November 28, 1975. On December 5, 1975, Mr. Justice Stewart extended to February 14, 1976, appellants' time to docket the appeal. The Jurisdictional Statement was filed on February 13, 1976, and on April 26, 1976, this Court entered its order noting probable jurisdiction. ____ U.S. ____, 96 S.Ct. 1723. The jurisdiction of this Court rests on 28 U.S.C. § 1257(2) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal involves the First Amendment, U.S. Const.; Section 1 of the Fourteenth Amendment, U.S. Const.; and Section 10 of the Michigan Public Employment Relations Act (hereinafter "PERA"), Mich. Stat. Ann. § 17.455(10) (1975 rev.). These are set forth in pertinent part as follows:

Constitution of the United States, Amendment I:

Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV. § 1:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

Michigan Statutes Annotated § 17.455(10):

(1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further; That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * *.

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.¹

¹The proviso to subsection (1)(c) and subsection (2) were added by Pub. Act 25; Mich. L. 1973, effective June 14, 1973.

QUESTIONS PRESENTED

1. Section 10 of the Michigan PERA authorizes agencies of the state to compel public employees to contribute financial support to unions as a condition of public employment. Does this statute on its face violate First- and Fourteenth-Amendment prohibitions of state-action which abridges freedoms of speech, association, and political autonomy?

2. The Michigan Court of Appeals held that Section 10 of the PERA was intended by the Michigan Legislature to allow public-sector unions to use coerced "service fees" for purposes other than collective bargaining, including political and ideological purposes.

(a) Did appellant public employees by their respective complaints make sufficient protests of political and other non-collective-bargaining spending by defendant union to have standing to challenge the constitutionality, as applied to them, of the statute sanctioning such expenditures?

(b) Apart from the question of the sufficiency of appellants' protests, does this statute as construed by the Michigan Court of Appeals violate by reason of overbreadth the ban of the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws abridging freedom of expression and association?

STATEMENT OF THE CASE

The appellants in these two consolidated cases are several hundred Detroit public-school teachers and counselors (hereinafter the "Teachers") who brought suit in Wayne County Circuit Court seeking declaratory and injunctive relief as to the constitutionality of a compulsory "agency-shop" arrangement between appellee Detroit Board of Education (hereinafter the "Board") and appellee Detroit Federation of Teachers (hereinafter the "Union") (A. 6-15, 39-52). Appellees entered into this arrangement in July 1969, effective

January 26, 1970 (A. 8-9, 43-44), and have continued substantially the same arrangement in successive agreements (R., Brief in Support of Claim of Appeal, Mich. Ct. App., April 11, 1974, at 12; Brief of Defendants-Appellees, Mich. Ct. App., July 19, 1974, at 1). Under the agency-shop the Teachers are compelled as a condition of employment either to join or pay to the Union each month a "service fee" in the same amount as its membership-dues (A. 9, 44).

The complaints alleged, *inter alia*, that this scheme in itself, and in its operation and effect, infringes the Teachers' freedom of association and other freedoms guaranteed them by the First and Fourteenth Amendments to the United States Constitution (A. 13-14, 49-50). Each complaint specifically alleged that dues and service fees collected by the Union were used for political and other purposes not collective-bargaining in nature of which appellants did not approve (A. 12, 48-49).

The *Warczak* case (Mich. Ct. App. Docket No. 19523) was filed on November 9, 1969 (A. 2), and the appellees immediately moved for summary judgment on the ground that the complaint did not state a claim upon which relief could be granted (A. 16, 19-20).² In opposition to that motion appellants made an offer of proof that the Union was using sums collected under the agency-shop scheme for political and

²This motion for "summary judgment" under Mich. Gen. Ct. R. 117.2(1) is the equivalent of a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or a common-law demurrer. *Crowther v. Ross Chemical & Mfg. Co.*, 42 Mich. App. 426, 429-31, 202 N.W.2d 577, 580 (1972). See *Bielski v. Wolverine Insurance Co.*, 379 Mich. 280, 283, 150 N.W.2d 788, 789 (1967):

For the purpose of that motion, both at the trial and appellate levels, every well-pleaded allegation in the complaint is assumed to be true.

For the sake of clarity, the Teachers will hereinafter use the term "demurrer" to describe this motion.

other non-collective-bargaining activities to which the Teachers objected (A. 21-23). This offer of proof was supported by affidavits of several individual Teachers setting forth facts within their personal knowledge, with documentation, respecting the Union's regular and substantial use of funds for specific political, legislative, and social purposes, and the affiants' opposition to such expenditures (e.g., A. 24-28).

Holding that "the agency shop provision is not repugnant to any statute or constitutional provision" (A. 34), the Circuit Court entered an order granting dismissal for failure to state a claim (A. 35-37). On appeal, on December 28, 1972, the Michigan Supreme Court vacated that order and remanded to the Circuit Court for further proceedings consonant with the intervening decision in *Smigel v. Southgate Community School District*, 388 Mich. 531, 202 N.W.2d 305 (1972) (A. 59-60). *Smigel* had held that an agency-shop arrangement such as the one in the instant case "is clearly prohibited by Section 10 of the Public Employment Relations Act, as of necessity either encouraging or discouraging membership in a labor organization." 388 Mich. at 543, 202 N.W.2d at 308.

The *Abood* case (Mich. Ct. App. Docket No. 19465) had been filed in Wayne County Circuit Court on April 23, 1970 (A. 3), and held in suspension pending the outcome of the *Warczak* appeal. Before any further action was taken by the Circuit Court in either case, Section 10 of the PERA was amended on June 14, 1973, by Public Act 25 of 1973 expressly to authorize agency-shop arrangements requiring public employees to pay service fees equivalent in amount to union membership-dues (A. 76). The Union and Board then moved for dismissal of both cases for failure to state a claim upon which relief could be granted (A. 68).

The Circuit Court granted appellees' demurrer in both cases, specifically adjudging that Public Act 25 "authorizes agency shop agreements in public employment" and "that said agency shop clause does not contravene the Constitution of the United States" (A. 75-77). The Teachers' motion for rehearing was denied by the Circuit Court (A. 78).

The Teachers' subsequent appeals in *Warczak* and *Abood*, contending that the trial court had erred in upholding the constitutionality of the agency-shop (A. 80-85), were consolidated by the Michigan Court of Appeals (A. 79). In a *per curiam* decision issued March 31, 1975, that Court held that the requirement of payment of service fees by the Teachers does not infringe their First- and Fourteenth-Amendment freedoms of speech and association, and that, though the use of funds collected under a statutorily authorized agency-shop arrangement for non-collective-bargaining purposes "could" abridge appellants' First-Amendment rights, they are not entitled to relief on this basis (A. 100-04). Rehearing was denied (A. 111).

The Michigan Supreme Court declined to take jurisdiction (A. 124) of the Teachers' timely application for leave to appeal which had been brought in order to contest the Court of Appeals' failure to declare Public Act 25 of 1973 and the agency-shop arrangement violative of the federal Constitution (A. 112-17). This Court then noted probable jurisdiction of appellants' appeal from the decision of the Court of Appeals. — U.S. —, 96 S.Ct. 1723.

SUMMARY OF THE ARGUMENT

This Court has been urged all too often to interpose the shield of the First Amendment between the aggressions of politically powerful majorities and the rights of politically weak minorities. This is another such case. Perhaps it is even more challenging to the wit and the courage of the Court than have been its many predecessors. For never before have the claims of the majority at first sight seemed so strong and the defenses of the aggrieved individuals so weak. But only at first sight. Examination and reflection will demonstrate that the claims which at first seem so strong are in the end

without rational or constitutional foundation, while the defenses which at first seem so weak grow the more constitutionally, morally, and rationally impregnable the more they are probed.

The majority in this case has used the power of the state in a particularly repugnant way. It has not been content to impose its will upon the dissident individuals, to compel them to yield to the majority their fundamental right to make their own employment contracts. Not satisfied with suppression so egregious, the majority has insisted that the oppressed individuals also be made *to pay* for the pains and penalties imposed upon them. And the State of Michigan has complacently acquiesced in—indeed, *authorized*—this extortionate process. Not even the chattel slaves before Emancipation were compelled to pay for the dubious privilege of having their employment relations controlled by someone else.

But there is more. The oppression here, like oppression everywhere, serves no valid public interest. On the contrary. With the financial means exacted from the dissenting minority the aggressive majority will strengthen its economic and political position and thus enhance its power to hold the community at ransom whenever the taxpayers resist its demands. The nonconforming individuals are the immediate target of the ambitious majority; but the community will be the ultimate victim if no check is placed upon the authority of the state to enable the aggressors in this case to wax invincibly strong by the exercise of the special privilege to make unwilling persons—the Teachers here—contribute to their financial support.

The case is this: the State of Michigan, the Detroit Board of Education, and the Detroit Federation of Teachers have in combination sought to compel the Teachers to pay dues or fees to the Union as a condition of public employment. Neither the statute which authorizes such compulsion, nor the Board in exercising it, has in any way limited the uses to which the Union may put the dues or fees so exacted. Indeed

the Michigan courts have expressly held that the Union may use the funds for purposes other than collective bargaining. It must therefore be presumed as an operative fact in this case that the Union may use the funds as it pleases, subject only to its own constitution and bylaws.

The Teachers maintain that what the State of Michigan, the Board, and the Union are doing, or trying to do, to them is wrong—fundamentally, indefensibly, unconstitutionally wrong. And they believe that an unbroken line of decisions in this Court, a line of decisions which has animated the Bill of Rights in the manner designed by its draftsmen, fully supports their belief.

We pray the Court's indulgence for the length of the argument and exposition which follow. Had the courts below checked their indecent haste to dispose of this case with the least possible consideration, had we been able to get from any of the Michigan courts in which we sought relief a straightforward and unequivocal opinion concerning the merits of our claims, it would not have been necessary to cover in scrupulous detail every phase of the case, substantive and procedural, as we have done here. But the courts below have been intent upon smothering the issues that the Teachers have raised, despite their profound significance, in a series of summary dismissals.

The decision from which we directly appeal is a masterpiece of vagueness, irrelevancy, and opacity. And from such a decision, the Supreme Court of Michigan flatly denied the Teachers an appeal, although a case more sensitively touching at once the personal freedom of Michigan civil servants and the fundamental political interests of the Michigan electorate can scarcely be imagined.

We regret the length but we make no apologies for the soundness of our argument. We have scrupulously dealt with every arguable contention against the Teachers that we could imagine, including many omitted by the other side and by the Michigan courts. We have delved deeply into all the decisions

of this and other courts which might have a possible bearing on the case. We have accorded the Constitution of the United States and the Bill of Rights the regard, the careful scrutiny, which the other side and the courts below have denied them. We believe that the Teachers' case is constitutionally impregnable.

ARGUMENT

I.

Conditioning public employment on a surrender of First-Amendment rights is unconstitutional on its face, hence in compelling them to associate with the Union by providing financial support to its political and economic activities, the Board and the State of Michigan abridged the Teachers' constitutional rights.

Private employers are constitutionally free to condition offers of employment virtually at will; but government, when acting as employer, must operate generally within the same system of constitutional restraints applicable to it in its role as rule-maker and law-enforcer. Part I.A., *infra*. Thus while private employers are constitutionally at liberty to condition employment on either membership or nonmembership in a labor organization, any government agency which limits employment to union members, or to employees who agree to refrain from joining or supporting unions, runs afoul of the First- and Fourteenth-Amendment strictures against state-action abridging freedom of association. When a government or one of its agencies limits public employment to only those persons who are willing financially to support a labor organization, and when it further appears that the financial support will be used to promote political activities opposed by those from whom it is exacted, political autonomy and free speech, as well as free association, are abridged. Part I.B., *infra* p. 18.

A.

Unlike private employment, public employment may not be conditioned upon a waiver or surrender of constitutional rights.

Resolution of the ultimate issue posed by this case turns upon the classic distinction, where constitutional restraints are involved, between the activities of private persons and of governmental authorities. Such restraints as private persons suffer originate in either the common law or valid statutes. As a general rule, the Constitution and particularly the Bill of Rights and the Fourteenth Amendment do not limit the freedom of action of private persons. They limit government. The provisions of the Fourteenth Amendment all have reference to state-action exclusively, and not to any action of private individuals. *Virginia v. Rives*, 100 U.S. 313, 318 (1880). Speaking for the Court more recently, Mr. Justice Stewart said:

It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. See *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.

Hudgens v. NLRB, ____ U.S. ____, ____, 96 S. Ct. 1029, 1033 (1976); *cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). To the same effect: *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *Talton v. Mayes*, 163 U.S. 376, 382, 384 (1896); *Withers v. Buckley*, 61 U.S. (20 How.) 84, 89-91 (1858).

Over the years, this Court has frequently had to grapple with the fact that state-action and private action are upon occasion so intermingled that the constitutional distinction

between them either disappears or can be maintained only with considerable difficulty. That the distinction persists in a meaningful sense is demonstrated, however, by the Court's reaffirmation recently in *Hudgens, supra*, and its antecedents over the past forty years or so.³

Professor Archibald Cox fixed the point with great precision when he said that "[t]he only rights exactly correlative to the duties imposed by the Fourteenth Amendment are rights against the state, not against private individuals." "Foreword: Constitutional Adjudication and the Promotion of Human Rights", 80 *Harv. L. Rev.* 91, 110 (1966). For the original juridical analysis from which Professor Cox derived this formulation, see W. N. Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning* 35 *et seq.* (Yale Press ed. 1923).

³Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972); Central Hardware Company v. NLRB, 407 U.S. 539 (1972); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); James v. Valtierra, 402 U.S. 137 (1971); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Evans v. Abney, 396 U.S. 435 (1970); Food Employees, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Cooper v. Aaron, 358 U.S. 1 (1958); Terry v. Adams, 345 U.S. 461 (1953); Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); James v. Bowman, 190 U.S. 127 (1903).

For helpful analyses and reviews of the foregoing developments, see Burke & Reber, "State Action, Congressional Power and Creditors' Rights: an Essay on the Fourteenth Amendment", 46 *So. Cal. L. Rev.* 1003 (1973); Lewis, "The Meaning of State Action", 60 *Col. L. Rev.* 1083 (1960); Wechsler, "Toward Neutral Principles of Constitutional Law", 73 *Harv. L. Rev.* 1 (1959).

1.

Private employers are at liberty under the Constitution to condition offers of employment on either membership or nonmembership in any private association, including labor organizations.

As a consequence of the distinction between state-action and private action, there has never been any question of the legal privilege of private employers (and employees) to condition their offers and acceptances of employment contracts in any manner agreeable to both parties—always providing that the conditions run afoul of no specific statutory or common-law proscription. Cf. 6A *Corbin on Contracts* §§1373 *et seq.*, esp. §§1376, 1419, 1420, 1470 (1962). This Court reviewed the relevant common-law principles in *Hitchman Coal & Coke Co. v. Mitchell*, and with the concurrence of dissenting Justices Holmes and Brandeis on this point, held that employers were as privileged to condition their offers of employment on nonunion membership⁴ as employees and unions were to insist that union membership be made a condition of employment.⁵ 245 U.S. 229, 250-52, 271-72 (1917).

⁴See also *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324 (1972); *Truax v. Raich*, 239 U.S. 33, 38 (1915). That *Hitchman* reflected a valid, even standard, common-law approach is demonstrated by its essential similarity to the point of view expressed in *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239 [House of Lords].

⁵E.g., *Williams v. Quill*, 277 N.Y. 1, 12 N.E.2d 547, *appeal dismissed*, 303 U.S. 621 (1938); *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297 (1897), *abandoned in* *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5 (1905), *on the authority of* *National Protective Ass'n v. Cummings*, 170 N.Y. 315, 63 N.E. 369 (1902). See also *Smith v. Bowen*, 232 Mass. 106, 121 N.E. 814 (1919); *Shinsky v. O'Neil*, 232 Mass. 99, 121 N.E. 790 (1919); *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908); *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324 (1909), *closed shop limited to "open" unions in* *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944).

See generally 1 L. Teller, *Labor Disputes and Collective Bargaining* §170 (1940); Witmer, "Collective Labor Agreements in the Courts", 48 *Yale L. J.* 195 (1938); Note, 24 *Va. L. Rev.* 567 (1938).

So broadly were these privileges conceived before the enactment of such legislation as the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1970), that the Court then held them to be constitutional rights, as well-immune to legislative infringement by either the federal government or the states. Thus both federal and state statutes forbidding contracts making nonunion membership a condition of employment were held unconstitutional. In *Adair v. United States*, 208 U.S. 161 (1908), this Court struck down the provisions of the federal Erdman Act outlawing such contracts. And in *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court invalidated a similar Kansas statute.

The foregoing conception of constitutional right has been largely abandoned. *Texas & N.O.R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570-71 (1930). And since *Adair*, *Coppage*, and *Hitchman*, the Court has upheld the authority of the states to enact "right-to-work" laws which deny to private employers the privilege of conditioning employment-offers upon either membership or nonmembership in any labor organization. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). The fact remains, however, that such limitations upon employers are statutory in character—not constitutional. None of the multitude of legal developments since *Adair*, *Coppage*, and *Hitchman* has weakened the principle that the Constitution itself in no way limits the contracting privileges of private employers. As pointed out by the three-judge federal court in *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969),

[t]here is nothing in the United States Constitution which entitles one to have a contract with another who does not want it.

To the same effect, see *Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *Van Zandt v. McKee*, 202 F.2d 490, 491

(5th Cir. 1953). This Court was applying the same constitutional principle in an analogous factual context when it upheld the right of the publisher in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to refuse to agree to print certain matter.

In sum, by the fundamental and inherent nature of our system, however else the conduct of private parties may be restrained—by common-law tradition or express statutory limitation—the Constitution and the Bill of Rights do *not* restrain them, in either the general area of contract or in the particular area of the employment contract.

2.

Restrained as they are by the Constitution, governments may not condition public employment or other public benefits upon a cession of constitutional rights, either directly by legislation or indirectly by administrative action.

The constitutional status of governments generally and of governmental employers particularly is sharply distinct from that of private persons, including private employers. At this late date, it would be merely pretentious to document extensively the well-founded fears of government power which brought the Bill of Rights into being. As was his way, our first president gave succinct expression to both an abiding truth and a then widely shared conviction when he said in his Farewell Address that:

Government is not reason, it is not eloquence—it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action.

The Bill of Rights grew out of such cognitions.⁶ To paraphrase President Woodrow Wilson, the history of the Bill of Rights, "like [t]he history of liberty is a history of the limitation of governmental power, not the increase of it." Address to the New York Press Club, *quoted in* E. D. Cronon, *The Political Thought of Woodrow Wilson* 188 (1965).

Hence it has long been taken for granted that the First Amendment is designed specifically to limit the power of all government, not only the power of the federal government, but by way of the Fourteenth Amendment, the power of state governments and local authorities as well. *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943); and see *Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963) (Sixth-Amendment safeguards apply to the states, along with other basic rights, through the Fourteenth Amendment).

Over the last generation and more, this Court has held that no government—local, state, or federal—may condition either public employment or any other public benefit on a waiver or surrender of any one of the rights guaranteed by the First and Fourteenth Amendments. *E.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972) (public employment); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (*semble*); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation benefits); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) (public employment); *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958) (tax exemption). As Mr.

⁶ "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors. . . . In 1951, in his opinion in *Dennis*, Mr. Justice Frankfurter, in quoting that statement, said of it [341 U.S. at 524], 'That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years.'" Meiklejohn, "The First Amendment is an Absolute", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 21 (1975).

Justice Stewart said in *Cafeteria & Restaurant Workers, Local 473 v. McElroy*: "The state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." 367 U.S. 886, 897-98 (1961).

It is now well settled, too, that conditioning any public benefit on a surrender of First Amendment rights is *prima facie* unconstitutional as well when judicial or administrative authorities impose such conditions as when legislatures do. *E.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79 (1972); *Watkins v. United States*, 354 U.S. 178, 188 (1957); *Barnette*, 319 U.S. at 637. The same principle controls in respect of admissions to the bar, a subject normally under the supervision of the courts. Mr. Justice Black summarized the relevant doctrine in a manner particularly well suited to a proper understanding and disposition of the issues of this case when he said that:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent v. West Virginia*, 129 U.S. 114. Cf. *Slochower v. Board of Education*, 350 U.S. 551; *Weiman v. Updegraff*, 344 U.S. 183. And see *Ex parte Secombe*, 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas v. Noble*, 261 U.S. 165; *Cummings v. Missouri*, 4 Wall. 277, 319-320. Cf. *Nebbia v. New York*, 291 U.S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356.

Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (footnote omitted).

B.

The requirement of financial support to the Union as a condition of their public employment infringes the Teachers' freedom of speech and their political and associational rights under the First and Fourteenth Amendments.

The present point constitutes the foundation of the Teachers' case. We establish here (1) that Michigan has conditioned the Teachers' employment on payment of union-dues, without limitation upon the uses to which the Union may put the funds thus exacted. We proceed then to demonstrate (2) that public employment may not be conditioned upon a waiver or surrender of First- and Fourteenth-Amendment liberties of speech, association, and political autonomy. And we show (3) that since public-sector unions are inevitably involved in demonstrably political activities at every level, forcing the Teachers financially to support the Union in spite of their opposition to its political activism constitutes an *a fortiori* abridgment of their freedom of speech and of their associational and political liberties.

1.

Under color of the Michigan PERA, the Board has required the Teachers to pay full dues or fees to the Union as a condition of employment, with no limit upon the uses to which it may put those dues and fees.

Section 10 of the Michigan Public Employment Relations Act authorizes all state employers to make agency-shop agreements with unions certified as exclusive-bargaining representatives in appropriate bargaining units. The statute does not limit in any way the uses to which exclusive-bargaining representatives may put the dues and fees thus exacted from unwilling state employees as a condition of their employment. It provides, in terms, that all employees in the bargaining unit

may be required to "pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Stat. Ann. §17.455(10) (1975 rev.).

After perusing the legislative history of §10, as amended (A. 85-94), the Michigan Court of Appeals held that the section was intended by the Michigan Legislature to allow public-sector unions to use the service fees thus derived to finance not only activities associated with collective bargaining but their political and ideological causes as well (A. 100-01). Since the Michigan Supreme Court declined review of this determination (A. 124), the decision of the Michigan Court of Appeals stands as the authoritative construction of §10 of the PERA. This Court must therefore assume in passing upon the constitutionality of §10 that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities. In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), this Court construed §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970)—a provision identical in most respects to PERA §10—as prohibiting the use of compelled dues and fees for political or ideological purposes. That option is unavailable here.

The stark posture in which the case comes to this Court is no fault of the Teachers. Promptly after §10 was amended to authorize the agency-shop, the Board and the Union entered a demurrer to the Teachers' complaints (A. 68). Despite the Teachers' opposition to the motion (A. 69-70), despite their allegations, which should have been taken as true, that the Union was using agency-shop dues and fees for political and ideological purposes (A. 12, 48-49), and despite the offer of proof and supporting affidavits to the same effect already in the record (A. 21-28), the demurrer was granted and affirmed

(A. 75-77, 100-04). If the case comes here bereft of that factual fulness for which this Court has quite properly shown a preference where grave constitutional questions are raised, the blame must fall upon the appellees and the Michigan courts; and the Teachers, who have done whatever they could to develop a record of adequate amplitude, should not be denied the opportunity to vindicate their constitutional rights.

The Board, the Union, and the courts below attempt to justify their precipitate disposition of this case on the ground that a prior decision of this Court has in a way largely settled the question of the basic constitutionality of such statutes as §10 of the Michigan PERA. That prior decision—the sole authority relied upon substantively by appellees and the courts below—is *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). We shall show in Part III., *infra* p. 187, that *Hanson* has almost nothing to do with this case, and that whatever logical, legal, and constitutional relationship there may be between the two is certainly of no help to appellees. To the degree that it is relevant here, we shall show, *Hanson* provides support for the Teachers, not for the Board or for the Union.

While we believe that *Hanson* does not dispose of this case, one way or the other, we are convinced that a long line of other decisions of this Court, especially those coming after the 1956 decision in *Hanson*, are dispositive and have been considered so by the inferior federal courts all over the country in a series of cases indistinguishable in principle from the present one. To those decisions of this Court and of the inferior federal courts we now turn.

Ruling principles developed in this Court, the uniform course of relevant decisions in the inferior federal courts, and the plain purpose of the First Amendment all dictate the conclusion that the state-action here challenged abridges the Teachers' freedoms of association, speech, and political autonomy.

This is a true and pure state-action case.⁷ The Michigan Legislature has authorized all the public authorities in the state to compel all the public employees in the state to pay dues and fees to certified unions as a condition of public employment. And the Board has proceeded to exercise that authority by agreeing with the Union to discharge any teacher who refuses to pay the Union for the privilege of continuing to teach in the Detroit public schools.

We have already shown that, as a general principle, action by any governmental authority which conditions public employment or other public benefits on a surrender of First-Amendment rights is *prima facie* unconstitutional. Our task now is to try this general principle for fit to a new set of facts. We believe that if fairness, logic, common sense, the high purpose of the Bill of Rights, the prior decisions of this Court, and the applications of those decisions by the inferior federal courts—if all these sovereign criteria are disinterestedly consulted, the Court can conclude only that the Teachers' constitutional rights have been abridged. We propose to elucidate this contention by demonstrating that:

⁷The Board "is a body corporate operating the schools situated in the City of Detroit, Wayne County, Michigan, as a school district under the general school laws of the State of Michigan" (A. 7, 43). Michigan school districts are agencies of the state. *Attorney General v. Detroit Bd. of Educ.*, 154 Mich. 584, 590, 118 N.W. 606, 609 (1908); *Attorney General v. Loweey*, 131 Mich. 639, 644, 92 N.W. 289, 290 (1902); Mich. Const. art. VIII, §2.

a. Since the decision in *Hanson*, 351 U.S. 225 (1956), the law of the First Amendment has undergone a marked development, particularly in respect to the speech, political, and associational rights of public employees—so marked that “the minimal analysis in the Court’s opinion” in *Hanson* (to adapt the observation of Mr. Justice Brennan, dissenting, in *Washington v. Davis*, 44 U.S.L.W. 4789, 4799 (U.S. Jun. 7, 1976)) cannot fairly be regarded as dispositive here.

b. On the strength of the conception of the First-Amendment rights of public employees developed over the last twenty years, the inferior federal courts all across the nation have held with perfect unanimity and fidelity to the principles elaborated here that no state authority may condition public employment on a surrender of the right of public employees to associate with labor organizations if they wish to do so.

c. Just as freedom of speech and of the press necessarily imply the right *not* to speak and *not* to publish, so too freedom of association necessarily implies the right *not* to associate. As a consequence, if the inferior federal courts have been faithful to the Constitution in holding that public authorities violate the First Amendment when they discharge public employees for having chosen to join labor organizations, it would be a travesty of law, logic, policy, and justice to hold that the same public authorities may constitutionally discharge—or agree with unions to discharge—public employees for having chosen to exercise their freedom of association by *refusing* to affiliate with any trade union.

d. Choosing *either* to extend financial support to or to withhold it from any organization is *mutatis mutandis* as definitely an exercise of freedom of association as choosing to accept or to reject formal membership therein would be; hence the Michigan Legislature in authorizing, and the Board in establishing, the requirement that the Teachers pay agency-shop fees to the Union as a condition of their employment, should be regarded as having violated their First-Amendment rights exactly as they would have done had they discharged the Teachers for having chosen to join and to pay dues to a union.

e. Quite clearly, Michigan could not compatibly with the Constitution compel its employees to join or pay dues to a particular religious sect, or some favored private charity, or a political party, or any other private and voluntary association, e.g., Common Cause. The infringement of political, religious, associational or speech-rights in any such case would be perfectly obvious. But if that much may be taken as established, then certainly the state should not be authorized to do indirectly through the vagaries of collective-bargaining elections, and of the bargaining stances of diverse state agencies such as the Board, what it could not constitutionally do directly. Surely, unions and their voluntary members have no greater claim to sovereign power than the State of Michigan, or, for that matter, the United States government, has. The state ought not to be able to gain the authority to diminish the freedom of association of some of its employees by enhancing the powers of compulsion of others. Pro-union employees have no greater constitutional rights than do those who object to union representation. As Mr. Justice Marshall has recently said for the Court, “this Court would reject * * * [the] contention if it were made * * * that respondents’ status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause * * *.” *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802 (U.S. Jun. 7, 1976).

a. Public employment may not be conditioned on a surrender of constitutional rights.

(i) At a time when government was, as Thornton Wilder once said, “small and funny”, few supposed that the Fourteenth Amendment and the Bill of Rights protected persons against anything other than positively prohibitory or penal kinds of governmental action. As employer rather than as ruler, government was considered indistinguishable from private employers, and thus possessed of the same kind of

authority that private employers had—to condition employment (or other beneficial arrangements) largely at will. *Supra* pp. 10-15. A frequently quoted example of this point of view is the statement by then Judge Holmes of the Massachusetts Supreme Judicial Court:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892). It would be at least injudicious and at most positively wrong to conclude that there is nothing left of the view Holmes expressed. It remains as true as ever, for example, that there is no such thing as a right (in the Hohfeldian sense of an enforceable claim⁸) to any particular government job or other benefit. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). Moreover, in certain areas of vital governmental activity, such as military installations, government as a necessary incident to its sovereign obligations "has traditionally exercised unfettered control." *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961). Finally, as the Court has quite recently reaffirmed, the transcending common interest in insulating the bureaucracy from undue political influence and in preventing it from becoming itself "a powerful, invincible and perhaps corrupt political machine" constitutionally authorizes governments to place limitations on the political activities of their employees which would clearly be unconstitutional if extended to the citizenry at

⁸See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* 23-31 (Yale Press ed. 1923).

large. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 566 (1973) (federal government); *Broadrick v. Oklahoma*, 413 U.S. 601, 604 n.2 (1973) (state governments).

Government is no longer small; it is not always funny any more, either. It is huge and overpowering. The fifteen million or more federal-, state-, and local-government employees constitute almost twenty percent of the total labor force of the country. This sobering state of affairs has brought before the Court a large number of complaints from public servants. And these cases have dramatically demonstrated how, if treated as just another employer, government might, by means of oppressive conditions of employment, succeed while occupying *that* rôle in suppressing on a grand scale the same range of civil rights and civil liberties which, among the citizenry at large, remains reasonably secure against frontal attack by government *qua* government.⁹

From its consideration of such cases, the Court has come to the conclusion that, in the most precise juridical and constitutional terms, governments are not, even in the employment relationship itself, *merely* employers in the ordinary sense. They draw all resources and all authority from the

⁹For representative cases, see *Perry v. Sindermann*, 408 U.S. 593 (1972); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886 (1961); *Speiser v. Randall*, 357 U.S. 513 (1958); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

And see Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law", 81 *Harv. L. Rev.* 1439, 1461-62 (1968), for a discussion of how the enormous increase in public employment has challenged the continued constitutional relevance of the Holmes dictum in *McAuliffe*.

people, including the resources and the authority expended and exercised in providing employment (and other benefits). That being true, the Court has concluded that governments must be bound by essentially the same constitutional restraints when they act as employers or benefactors as they are when they perform their more traditional functions of rule and command. Thus:

In *Speiser v. Randall*, 357 U.S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." 357 U.S., at 526. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, at 518. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert v. Verner, 374 U.S. 398, 405-06 (1963). And again:

[T]hat a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183 [(1952)]. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "... that no federal employee shall attend Mass or take any active part in missionary work."

Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961), quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947).

Speaking for the Court in *Keyishian v. Board of Regents*, Mr. Justice Brennan evaluated the status of the "premise * * * that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." Constitutional doctrine which has since emerged, he said, "has rejected * * * [that] major premise." 385 U.S. 589, 605 (1967).

Mr. Justice Marshall, writing for the Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), reaffirmed even more fully the unconstitutional-conditions principle repeated in *Keyishian*. He said:

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. * * * "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

391 U.S. 563, 568 (1968), quoting *Keyishian*, 385 U.S. at 605-06.

As a final indication of the Court's consistent stand against conditioning government employment on waivers or surrenders of constitutional rights of speech or association, Mr. Justice Stewart's summation for the Court in *Perry v. Sindermann* is conclusive:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of

reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

408 U.S. 593, 597 (1972).

(ii) The principles developed in the foregoing cases cut across all the basic liberties of Americans, both those expressly stated in the Bill of Rights and those, such as the freedoms of political autonomy and association, which lie so deeply imbedded in the foundations of American liberty that life here cannot even be imagined without them. Because political autonomy and free association are the aspects of liberty most seriously and directly threatened by the Board in this case, it seems desirable to bring to the Court’s attention at this point the frequency with which those rights have been declared to be of the first order of importance.

By now, freedom of association has been recognized so often as a First-Amendment right that it has even merited an extensive annotation, where all the relevant cases are collected and discussed. Annotation, “The Supreme Court and the First Amendment Right of Association”, 33 L. Ed. 2d 865 (1973). As long as sixteen years ago, this Court was saying: “It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge v. Oregon*, 299 U.S. 353, 364; *Bates v. Little Rock*, [361 U.S.] at 522-523.” *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960). Yet even earlier than that, in

Sweezy v. New Hampshire, the then Chief Justice referred to “past expressions and associations” as exercises of “rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.” 354 U.S. 234, 250 (1957).

Among the most powerful as well as earliest identifications of association as a basic freedom, indeed, is the one quoted in *NAACP v. Button*, 371 U.S. 415, 431 (1963):

“Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups. . . .” *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (plurality opinion). Cf. *De Jonge v. Oregon*, 299 U.S. 353, 364-366.

In 1952, Mr. Justice Frankfurter referred with natural ease to the “right of association [as] peculiarly characteristic of our people.” *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). Twenty years later, Mr. Justice Powell definitively located freedom of association among the great, basic rights:

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition. See, e.g., *Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) * * *; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (Harlan, J., for a unanimous Court). There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right.

Healy v. James, 408 U.S. 169, 181 (1972).

It seems fair to say that the foregoing expressions, drawn as they are from decisions spanning a whole generation, establish freedom of association and political autonomy as integral features of the architecture of personal freedom blueprinted in the Bill of Rights, even though not expressly mentioned there.¹⁰ Not every feature of any structure is always visible, either on paper or in the sensory order. Its foundation is normally not visible after a building is erected. But the building could not stand without its foundation, however invisible, and the other liberties of Americans would be as precarious as a foundation-less building should political autonomy and its integral mechanism, freedom of association, be pulled out from under them or allowed to decay by neglect. Quite possibly a similar idea induced Chief Justice Burger to

¹⁰See *Perry v. Sindermann*, 408 U.S. 593 (1972); *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 578-79 (1971) ("workers have a right under the First Amendment to act collectively to secure good, honest lawyers to assert their claims against railroads"); *In re Stolar*, 401 U.S. 23, 28-30 (1971) ("First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization"); *United States v. O'Brien*, 391 U.S. 367, 385 (1968); *United States v. Robel*, 389 U.S. 258, 263 (1967) ("the operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment"); *Cramp v. Board of Public Instruc.*, 368 U.S. 278, 282 (1961) (state-action invalidated because it "impinge[d] upon *** constitutionally protected right of free speech and association"); see also *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 250-51 (1957) (Frankfurter, J., concurring).

The early development of free association as a First-Amendment right is covered by C. Rice, *Freedom of Association* (1962), and by Fellman, "Constitutional Rights of Association", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 58-59 (1975). Cf. Emerson, "Freedom of Association and Freedom of Expression", 74 *Yale L.J.* 1 (1964).

say, only last term, that "I have long thought freedom of association and freedom of expression were two peas from the same pod." *Buckley v. Valeo*, ____ U.S. ____, ____, 96 S. Ct. 612, 738 (1976) (dissenting in part).

(iii) Although "the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer", *McElroy*, 367 U.S. at 897-98, it does not follow that those governments have no control at all over the qualifications for or conditions of public employment. This Court has not pursued the "unconstitutional-conditions" principle that remorselessly. In one of the earlier cases, for example, Mr. Justice Clark said for the Court:

To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.

Slochower v. Board of Higher Education, 350 U.S. 551, 555 (1956). And in *Pickering* Mr. Justice Marshall disavowed any intention to strip government-employers of all control over their employees. "The problem in any case", he said, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.

Properly harmonizing the contending values must obviously preserve, for government, authority over its employees sufficient to insure proper performance of the legitimate functions that our governments have been created to serve; while at the same time preserving for government-employees to the greatest possible extent the basic liberties that all private citizens possess. Cf. *Healy*, 408 U.S. at 202-03 (Rehnquist, J., concurring).

The proper way to reconcile the needs of government with the constitutional rights of public employees, as suggested

repeatedly by the decisions of this Court, is the strictly neutral, objective, job-related or job-oriented set of rules (usually referred to as the "merit system") which prevails by and large throughout the civil service. Cf. O. G. Stahl, *Public Personnel Administration* 29-45, 310-55 (6th ed. 1971); F. C. Mosher, *Democracy and the Public Service* 187, 202 *et seq.* (1968). A similar approach was plainly involved in Justice Black's comment that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

Quite recently, in *Washington v. Davis*, the Court has had occasion to examine carefully one aspect of the civil-service merit system, the so-called "Test 21" utilized by the Washington, D.C., police force in its hiring process. Challenged under the Fourteenth Amendment as racially discriminatory, Test 21 was upheld even though a disproportionate number of black applicants allegedly failed it. In rejecting the challenge to Test 21, this Court relied upon and quoted favorably the trial court's finding to the effect that "the test * * * [was] reasonably and directly related to the requirements of the police recruit training program and * * * [was] neither so designed nor operated to discriminate against otherwise qualified blacks." 44 U.S.L.W. 4789, 4791 (U.S. Jun. 7, 1976), *citing Davis v. Washington*, 348 F. Supp. 15, 17 (D.D.C. 1972).

Similarly, the Court decided last term that so long as the discharge of a public employee (a police officer) was based upon his alleged violation of job-related rules—not on an exercise of rights protected by the First and Fourteenth Amendments—there was no occasion for the federal courts to review the discharge, even though, because summary judgment was granted, the Court was required to assume (as the

plaintiff had alleged) that the discharge was based on mistaken reasons. Speaking for the majority, Mr. Justice Stevens said:

In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 44 U.S.L.W. 4820, 4823 (U.S. Jun. 10, 1976).

In applying *Washington v. Davis* and *Bishop v. Wood* to this case, the relevant question is whether the Board's compulsory-dues requirement—a requirement with, to say the least, First-Amendment implications—is in any sense "job-performance-related" or bears any rational relationship at all to appellants' functions as school-teachers. *See infra* pp. 128-47. It is difficult indeed to see how there could be a positive correlation between teaching-talent or teaching-performance and paying dues to a union. One may confidently premise, on the basis of the cases that we have been considering, that a set of civil-service rules which set forth, among other requirements, that the teachers belong or pay dues to a private association permeated with political characteristics would be held unconstitutional *per se*—flatly and irrebutably. Cf. *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961).¹¹ And if such

¹¹In an interesting case, practically on all fours with the present one, the Pennsylvania Court of Common Pleas, sitting *en banc*, found a compulsory-dues requirement so incompatible with the purposes of the civil-service tenure laws governing the employment of teachers that it refused to hold the Pennsylvania PERA provision authorizing the agency-shop in public employment applicable to the teachers involved in the case. *Pennsylvania Labor Relations Board v. Uniontown Area School Dist.*, ___ Pa. D.&C.2d ___, 357 A.2d ___ (C.P., Fayette Cty., No. 737, May 20, 1976).

a supposition is sound, there is no reason to believe that the constitutional defect would be cured by placing the invalid condition in a collective agreement rather than in the civil-service rules. *See infra* p. 56.

b. Public employment may not be conditioned on nonmembership in a labor organization.

The Board, the Union, and the Michigan courts have studiously ignored the line of decisions just reviewed. Not so much as a mention of them is to be found even in the case tables of appellees' briefs in the lower courts,¹² despite the fact that they have from the beginning constituted the principal authority upon which the Teachers have relied.¹³ The only recognition found in the Michigan Court of Appeals' decision that there is a serious constitutional question in this case was its grudging admission that the agency-shop clause authorized by PERA §10 "could" violate plaintiffs' First- and Fourteenth-Amendment rights (A. 102)—an admission withdrawn almost as soon as it was made, on the basis of cases which, to say the least, as we shall show in Part III., *infra*, by

¹² R., Brief of Defendants-Appellees in Opposition to Plaintiffs-Appellants' Application for Leave to Appeal, Mich. Sup. Ct., Jul. 7, 1975; Brief of Defendants-Appellees, Mich. Cir. Ct., Jul. 19, 1974, at iii-v; Brief of Detroit Federation of Teachers in Support of Motion for Summary Judgment, Mich. Cir. Ct., Dec. 18, 1969, at i-iv.

¹³ R., Plaintiffs-Appellants' Brief in Support of Application for Leave to Appeal, Mich. Sup. Ct., Jun. 3, 1975, at 14-30; Appellants' Reply Brief, Mich. Cir. Ct., Jan. 24, 1975, at 3-14; Brief in Support of Claim of Appeal, Mich. Cir. Ct., Apr. 11, 1974, at 15-27, 35-47, 64-70; Memorandum in Opposition to Motion of Defendants for Summary Judgment in Their Behalf, Mich. Cir. Ct., Jul. 13, 1973, at 5; Brief for Plaintiffs on Motion for Summary Judgment, Mich. Cir. Ct., Dec. 18, 1969, at 27-35.

no means support the decision of the Michigan court.

However, while the line of decisions ranging from *Barnette* to *Keyishian*, *Pickering*, and *Sindermann* has been denied even the barest consideration by appellees and the Michigan courts, the inferior federal courts uniformly have found in those cases a mandate to hold that no public employer may condition public employment upon a renunciation of the free association exercised when a public employee chooses voluntarily to affiliate with a labor organization.¹⁴

The rulings of the inferior federal courts have been ignored by appellees and the Michigan courts as scrupulously as they have ignored the precedents of this Court upon which those rulings were based. This determination neither to see nor to hear nor to say anything about these cases is perhaps understandable. Since they are the precedents most obviously and immediately relevant to a fair and reasoned disposition of the present case, however, the studied refusal of the Michigan courts to admit their mere existence cannot be condoned. Certainly the Teachers do not intend to be confined by the tunnel vision of the Board, the Union, and the Michigan courts, or to emulate them as living versions of the three small simians who hear no evil, see no evil, speak no evil.

Although a considerable number of the inferior federal courts have ruled that public employees may not constitution-

¹⁴ COURTS OF APPEALS: *American Fed'n of State, County, & Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *Hanover Township Fed'n of Teachers v. Hanover Community School Corp.*, 318 F. Supp. 757 (N.D. Ind. 1970), *aff'd*, 457 F.2d 456 (7th Cir. 1972); *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970).

THREE-JUDGE COURTS: *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971); *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969), *appeal dismissed per stipulations*, 400 U.S.

(continued)

ally be discharged or otherwise discriminated against for joining unions, it will be sufficient for present purposes to focus attention upon only the first three decisions in the line, since they are representative of the others and since, moreover, they expose their origins more fully than their successors do.

These three decisions—*Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court), *American Federation of State, County, and Municipal Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969), and *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)—were all handed down in the few months from June 1968 to February 1969. The dates are important. This Court had only recently held in *Pickering* that a public-school teacher could not be discharged for speaking critically of the local board of education even though his speech contained a number of mistakes. Ten years earlier, the Court had declared the right of free association to be a First-Amendment right. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). These two cases, and the others which came between them, were the principal authorities for the Seventh Circuit's decision in *McLaughlin* that the Cook County Board of Education violated the First and Fourteenth Amendments in discharging school-teachers for having joined the American Federation of Teachers. 398 F.2d at 288-89. "Just this month", said Judge Cummings for the Seventh Circuit, "the Supreme Court held [in *Pickering*] that

(footnote continued from preceding page)

801 (1970); *Police Officers' Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *Vorbeck v. McNeal*, 407 F. Supp. 733 (E.D. Mo.), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976).

FEDERAL DISTRICT COURTS: *Bateman v. South Carolina State Ports Authority*, 298 F. Supp. 999 (D.S.C. 1969); *Firefighters, Local 2340 v. Willis*, 400 F. Supp. 1097 (N.D. Ill. 1975); *Service Employees Int'l Union v. County of Butler*, 306 F. Supp. 1080 (W.D. Pa. 1969); *Teamsters, Local 594 v. City of West Point*, 338 F. Supp. 927 (D. Neb. 1972).

an Illinois teacher was protected by the First Amendment from discharge even though he wrote a partially false letter to a local newspaper in which he criticized the school board's financial policy. * * * If teachers can engage in scathing and partially inaccurate public criticism of their school board, surely they can form and take part in associations to further what they consider to be their well-being." *Id.* at 289.

In January 1969, the *Woodward* case relied on the same line of decisions which the Seventh Circuit had found determinative in *McLaughlin*, citing *Keyishian* and *McLaughlin* itself, in addition to a number of those we have reviewed *supra* p. 23. See 406 F.2d at 138-40 & n.5. Speaking for the Eighth Circuit, Judge Heaney said that "[u]nion membership is protected by the right of association under the First and Fourteenth Amendments" and that "[u]nless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment." *Id.* at 139, 140, quoting *McLaughlin*, 398 F.2d at 289.

A month later, in February 1969, a three-judge federal court in North Carolina, in *Atkins v. Charlotte*, joined the Seventh and Eighth Circuits in holding that—for public employees (firemen in this case)—joining a union is an exercise of the First- and Fourteenth-Amendment right of freedom of association. 296 F.Supp. at 1075. It joined the two circuits also in reasoning from such decisions as *Keyishian* and *Pickering* that the State of North Carolina could not prohibit public employees from joining a union. 296 F.Supp. at 1075-77.

As already noted, the federal courts have since 1969 followed *Woodward*, *Atkins*, and *McLaughlin* with perfect unanimity. *Supra* note 14. This state of affairs contrasts sharply with the earlier point of view, shared by state courts from coast to coast, to the effect that joining a union was impermissible to public employees as an intolerable threat to the sovereign powers and duties of the governments which employed them. *E.g.*, *Perez v. Board of Police Commis-*

stoners, 78 Cal. App. 2d 638, 178 P.2d 537 (1947); *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875 (N.Y. Sup. Ct. 1943). This change has doubtlessly been brought about by the repeated decisions of this Court that freedom of association is a First-Amendment right, and by the inference that public employees therefore have a constitutional right to make up their own minds, free from any threat of reprisal by their public employers, as to whether or not they should join unions. *Supra* pp. 23-33.

The unconstitutional-conditions decisions, with their emphasis upon political and associational autonomy, have produced another line of cases in the inferior federal courts which is of some relevance to the present case. We refer here to what have come to be called the "political-patronage" or "spoils-system" cases.¹⁵

Typically in these cases, upon a change of administration which involves also a change in the party in power, the new administration will either discharge outright those public employees (not protected by civil-service tenure laws) who belong to the losing party or who, when given the option, refuse to change their party affiliation or to support the party newly in power. Once again basing their decisions on this

¹⁵ *Burns v. Elrod*, 509 F.2d 1133 (7th Cir. 1975), *cert. granted*, 423 U.S. 821 (1975); *Calo v. Paine*, 521 F.2d 411 (2d Cir. 1975), *overruling* *Alomar v. Dwyer*, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); *Indiana State Employees Ass'n v. Negley*, 501 F.2d 1239 (7th Cir. 1974); *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928, 943 (1973); *Shakman v. Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971). Cf. O'Neill, "Politics, Patronage, and Public Employment", 44 *Cinn. L. Rev.* 725 (1975); Comment, "A Constitutional Analysis of the Spoils System—the Judiciary Visits Patronage Place", 57 *Iowa L. Rev.* 1320 (1972); Comment, "Patronage Dismissals: Constitutional Limits and Political Justifications", 41 *U. Chi. L. Rev.* 297 (1974).

Court's unconstitutional-conditions doctrine, the courts have uniformly been holding patronage dismissals unconstitutional on associational and political-autonomy grounds—except in the case of policy-making officials.¹⁶

We do not contend here that these patronage-dismissal decisions are either necessarily mandated by the unconstitutional-conditions doctrine or indistinguishable from the present case. We believe that tradition must count for something if the country is to achieve a tolerable degree of unity within the diversity that liberty breeds. Patronage dismissals are nothing if not traditional; they have long been understood to be a part of the American political game. More important, however, patronage dismissals (always outside the civil-service system) have a definite working relationship with the system of representative government which in this country we are striving to build. It does the electorate little good to "vote the rascals out" if the "rascals" cannot be made to take their henchmen with them. Again, voting in a reform party would be a bootless effort if the reformers had to rely upon their predecessors' possibly corrupt appointees in order to bring about the reforms on the strength of which they were elected.

No doubt the patronage-dismissal cases if affirmed would constitute additional authority for the Teachers here. Indeed, affirmance of the decisions invalidating patronage dismissals would make an *a fortiori* case for the Teachers. For while there is some positive contribution to the democratic process in a patronage dismissal, no such contribution exists in a dismissal of a faithful civil servant simply because he or she

¹⁶ *But see* *American Fed'n of State, County, & Municipal Employees v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971), notable not only for its departure from the general tendency to view patronage dismissals as unconstitutional but also for its mordant reflection that "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword." *Id.* at 536, 280 A.2d at 378.

has declined to associate with a labor organization. As a matter of fact, whether we like it or not, it still remains an open question whether compulsory public-sector unionism is compatible with representative government at all. *See infra* pp. 62-76, 164-76. But even were it to appear, ultimately, that representative government can survive compulsory unionism substantially as well as formally, it would still constitute an invasion of free association and of political autonomy for any government to compel its employees to join or pay dues to a labor organization as a condition of employment. Rational inference from the decisions of this Court heretofore reviewed and from the decisions of the inferior federal courts reviewed in the present section leads overpoweringly to such a result.

A possible argument against the Teachers is that freedom of association somehow protects only those who choose to associate, not those who choose to *refrain from* associating. We deal with this contention in the succeeding section. One other escape-method is conceivable. It might also be argued that requiring only financial support of a private organization—not formal membership therein—does not infringe associational rights “because only money is involved, not active, physical or ideological association”. We deal with this possible technique of avoiding the unconstitutional-conditions doctrine in the next section but one. *Infra* p. 46.

c. By parity of reasoning public employment may not be conditioned upon membership in a labor organization.

Whether a constitutional right *not* to associate with a private, politically oriented organization shall prevail in public employment is the crux of this case. Were this not so, the Court might justly condemn counsel for wasting its time with an effort to prove the existence of what would seem to be a self-evident truth. For, as an original proposition, the concepts “right” and “privilege” would seem necessarily to imply

freedom either to act or to decline to act in respect of the subject in question. Thus: freedom of religion, if meaningful, must comprehend freedom (or “the right”) to embrace or to reject any religious creed; free speech, the right to remain silent; freedom of the press, the right not to publish; freedom of petition, the choice to rest easy; political autonomy, the option to be independent of all parties; and freedom of association, the right to remain a loner.

Argument to the contrary produces only paradox. If “right” or “privilege” connoted only the positive aspect, every “right” or “privilege” would be at the same time a “duty” or an “obligation”. No legal system could function within such contradictions. As Mr. Justice Sutherland indicated in *Patton v. United States*, it is impermissible “to convert a privilege into an imperative requirement.” 281 U.S. 276, 298 (1930). And Justice Frankfurter was expressing the same idea, in a Sixth-Amendment case, when he said that “[w]hat were contrived as protections for the accused should not be turned into fetters” and that to force a lawyer upon an unwilling defendant would be “to imprison a man in his privileges and call it the Constitution.” *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942). Just last term, in an opinion by Mr. Justice Stewart, the Court reaffirmed its adherence to the conception that in the constitutional context the terms “right”, “liberty”, and “freedom of choice” are interchangeable:

[T]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master * * *.

Faretta v. California, 422 U.S. 806, 820 (1975). The dual implication of the term "right" has been noted in cases spanning the First-Amendment liberties:

(i) *Religion and Speech*:

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all * * *.

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination.

Board of Education v. Barnette, 319 U.S. 624, 645-46 (1943) (Murphy, J., concurring).

"Neither a state nor the Federal Government * * * can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961), quoting *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

Freedom of speech presupposes a willing speaker.

Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., ____ U.S. ____, ____, 96 S. Ct. 1817, 1823 (1976).

(ii) *Freedom of the Press*

Dissenting in *Pittsburgh Press [v. Pittsburgh Human Relations Comm'n]*, 413 U.S. 376, 400 (1973), Mr. Justice Stewart joined by Mr. Justice Douglas, expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." * * *

* * * * *

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press Co.*, 297 U.S. 233, 244-245 (1936).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 255-56 (1974) (footnote omitted).

Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, *Government and Mass Communications* 633 (1947).

Id. at 261 (White, J., concurring).

(iii) *Political Autonomy*:

Neither the United States nor any State may require any individual to salute or express favorable attitudes toward the flag. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

Smith v. Goguen, 415 U.S. 566, 589 (1974) (White, J., concurring).

To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Barnette, 319 U.S. at 634.

If freedom of speech, press, religion, and political action necessarily imply the freedom *not* to speak, *not* to publish, *not* to believe, and *not* to participate in party politics, it is impossible to see how freedom of association, which the Court has repeatedly accorded equivalent status, can be limited to only its positive, active, aspect. Mr. Justice Douglas, though dissenting, was undoubtedly uttering a fixed truth when he said that:

The right of association is an important incident of First Amendment rights. The right to belong—or not to belong—is deep in the American tradition.

Lathrop v. Donohue, 367 U.S. 820, 881-82 (1961).

Proving that the right of *nonassociation* exists is something like proving that the sun rises in the East and sets in the West. *Of course* it exists and is exercised, day in and day out, year in and year out, by millions of Americans. In fact, the right of *nonassociation* ranks at the very top of the institutions which distinguish free societies from unfree ones.¹⁷

Moreover, as regards the right of *nonassociation* with labor unions, it should be and in the eyes of the law *is* no different from the right of *nonassociation* with any other voluntary, private, association. This Court has held consistently that the union-membership relationship is contractual—hence voluntary—in character. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 182 (1967); *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958). See also *NLRB v. Boeing Co.*, 412 U.S. 92 (1973); *Scofield v. NLRB*, 394 U.S. 423 (1969); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Marlin Rockwell Corp.*, 114 N.L.R.B. 553 (1955); *Union Starch & Refining Co.*, 87 N.L.R.B. 779 (1949).

¹⁷ Cf. *Good v. Associated Students*, 86 Wash. 2d 94, 100-04, 542 P.2d 762, 766-68 (1975), citing C. Rice, *Freedom of Association* xviii, 88 (1962).

Writing for the Court in *Granite State Board*, Mr. Justice Douglas spelled out the nature of the union-membership relationship:

We have here no problem of construing a union's constitution and bylaws defining or limiting the circumstances under which a member may resign from the union. We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit “subject of course to any financial obligations due and owing” the group with which he was associated.

NLRB v. Granite State Joint Board, 409 U.S. 213, 216 (1972), quoted with approval in *Booster Lodge No. 405, Machinists v. NLRB*, 412 U.S. 84, 88 (1973).

The “financial obligations” referred to at the end of the foregoing quotation undoubtedly meant only those which the renouncing employees had incurred as voluntary members. In any event, *Granite State Board* involved private-sector employees subject to the agency-shop provisions of National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). Cf. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). As we have seen, private-sector employers at common law were privileged to condition employment largely at will, limited only by specific statutes or exceptional common-law rules. *Supra* pp. 13-15. In merely *permitting* them to continue to make the kinds of agreements that they were privileged to make at common law, the National Labor Relations Act does not raise the kind of constitutional question that the Board has raised in compelling the Teachers to associate with the Union as a condition of their public employment. Cf. *Linscott v. Millers Falls Co.*, 440 F.2d 14, 19-20 (1st Cir.) (Coffin, J., concurring), cert. denied, 404 U.S. 872 (1971). See *supra* pp. 11-17, and *infra* pp. 191-95. The Homes dictum in *McAuliffe* remains as applicable to *private* employers today as it did when he wrote it in 1892. But as we have shown in the

preceding subsections of this brief, all public employers—state, local, and federal—are constrained by the First Amendment to avoid conditioning public employment on waivers or forfeitures of the right of association or nonassociation.

We have before us the question whether the Board, an agency of the State of Michigan, could constitutionally compel the Teachers to associate with the Union. The Teachers did not and do not wish to associate with the Union. They prefer to dissociate themselves from it. If freedom of association is a First-Amendment right, as this Court has held in a multitude of cases, many of them cited herein; if freedom of association comprehends both the right to associate and the right *not* to associate, as the fundamental juridical character of all rights would seem to imply and as this Court has frequently noted; and finally, if it is true, as it most certainly is, that public employment may not under the consistent rulings of this Court be conditioned upon a surrender of any First-Amendment right—then it would seem that the action taken by the Board and the Union against the Teachers in this case is on its face a clear violation of their First-Amendment rights.

Appellees may contend that in compelling the Teachers to pay dues and fees to the Union they did not force them to become formal members and therefore did not violate their freedom of association. This conception of the meaning of free association, as narrow and artificial as it may seem, must nevertheless be considered carefully and candidly. And to that task we now turn.

d. Compulsory financing of a labor organization infringes freedom of association.

The Teachers contend that the Board's requirement that they pay dues and fees to the Union as a condition of employment violates their First- and Fourteenth-Amendment freedoms of speech, association, and political autonomy.

Establishing the validity of this contention calls for demonstration (i) that forcing financial contributions to a private association—especially to a private association of a fundamentally political character, *see infra* pp. 62-76—amounts to essentially the same thing as compelling the Teachers to accept formal membership therein, from the point of view of the First Amendment; and (ii) that this Court has taken a firm stand against any such form of compulsion, identifying financial exactions with the other forms of compulsion denied to the states. It will be necessary also to show (iii) that the Teachers' position is unaffected by this Court's decisions in *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956).

(i) Although in dissent, Justice Black was stating sound constitutional doctrine when he said that:

[The First] Amendment leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money to advance the fortunes of candidates he would like to see defeated or to argue ideologies and causes he believes would be hurtful to the country [;]

and revealing an acute grasp of the facts of life when he said:

"[o]ne who is compelled to contribute the fruits of his labor to support or promote *political or economic* programs or support candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give his vocal support to doctrine he opposes." I fully agree with this holding of the Georgia Supreme Court and would affirm its judgment with certain modifications of the relief granted[;]

and relating sound constitutional doctrine to the facts of life when he said:

Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government

of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, *whether economic, scientific, political, religious or any other.*

International Association of Machinists v. Street, 367 U.S. 740, 783-84, 791 (1961) (footnote omitted) (emphasis supplied).

Recognition in the *United States Reports* that financial contributions are tantamount to physical participation in First-Amendment activities has not been limited to dissenting opinions. Contributions were identified with personal, physical, association just last term in *Buckley v. Valeo*:

The [1975 Campaign Financing] Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee * * *.

— U.S. —, 96 S. Ct. 612, 633-34 (1976). Partly in dissent, the Chief Justice identified financial contributions as First-Amendment activity even more emphatically than the majority in *Buckley* had done:

The Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply will not wash. * * * [P]eople—candidates and contributors—spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utter the words.

Id. at —, 96 S. Ct. at 738-39.¹⁸ There can be no doubt that the Court has been correct in identifying the right to make

¹⁸Other cases in which financial support of an organization was considered association protected by the First Amendment are, e.g., *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960); *Bond v. County of Delaware*, 368 F. Supp. 618, 625-27 (E.D. Pa. 1973); *Pollard v. Roberts*, 283 F. Supp. 248, 257-58 (E.D. Ark.) (three-judge court), *aff'd mem.*, 393 U.S. 14 (1968).

(or to refuse to make) financial contributions with the rights to speak (or to remain silent), to associate (or to refuse to associate), and to engage (or to refuse to engage) in political activities. The Teachers' money is, after all, nothing other than their past labors in an exchangeable form, a product of their energy-expenditures, physical and mental. When it is granted to or withheld from any organization, it is the same as granting or withholding the services for which the human energy stored up in the money would be exchanged. Thus to compel the Teachers to pay dues to the Union, as both a logical and a practical matter, is the same as to compel them physically to participate in, as well as to fund, the Union's economic and political activities.

(ii) The Court has not only associated the stored-up energy which we call money with the great First-Amendment rights; it has also held flatly that it is impermissible to construe the First Amendment so narrowly that commercial transactions and especially commercial advertising are arbitrarily excluded. In *Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —, —, 96 S. Ct. 1817, 1826 (1976), the question asked of the Court was whether speech which proposed only a commercial transaction was so removed from any exposition of ideas that it was not entitled to any First Amendment protection. Mr. Justice Blackmun's succinct response for the Court: "Our answer is that it is not." Mr. Justice Blackmun also regarded as "already * * * settled or beyond serious dispute" that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." *Id.* at 1825.

There is nothing new in the perception that financial exactions rank high among the weapons with which civil rights and civil liberties may be diminished. In his concurring opinion in *Street*, Mr. Justice Douglas recalled that the Founding Fathers long ago had voiced their hostility to even minor exactions imposed by the state for the benefit of private establishments:

Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison (Hunt ed. 1901), p. 186.

Jefferson, in his 1779 Bill for Religious Liberty, wrote "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See 12 Henning's Va. Stat. 85; Brant, Madison, *The Nationalist* (1948), p. 354.

367 U.S. at 778 n.4.

Surely it would shock those who drafted the Bill of Rights to learn that some of the states have arrogated to themselves the power to make their employees kick back a part of their salaries to private associations deeply enmeshed in political activities. See *infra* pp. 62-80. What we have here is even worse than the "tax on belief and expression" which the Court struck down in *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (Black, J., concurring). The exaction imposed by Michigan on its public-school teachers compels them to finance both economic and political-ideological activities which they profoundly oppose. If Michigan may constitutionally do this to its public servants, where does its power end?

This Court must bear in mind that we are at the threshold of the many and grave constitutional issues so evident in the process of compulsory public-sector bargaining which is beginning to take hold in the states and localities. Loud arguments will be made in justification of the imposition now before the Court. But the time to resist beginnings is at the beginning. *Barnette* was a great decision, and Mr. Justice Jackson's opinion for the Court has proved imperishable equally for its eloquence and its wisdom, precisely because they both were alert to the implications of the issues involved

and courageously determined to hold fast to the strong shield of liberty provided by the First Amendment. Just as the government officials were in *Barnette*, so too will the unions and state agencies in cases such as this be fertile in producing reasons why one after another imposition is useful or serviceable. With each new imposition, the First-Amendment liberties of dissident public employees will be diminished—till, finally, they will be sadly reduced as human beings. Before so repugnant a result is allowed, it would be well to heed Justice Jackson's warning against permitting rationalizations of utility to wear away the protections of the First Amendment:

Whether the First Amendment * * * will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any particular creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Barnette, 319 U.S. at 634 (footnote omitted).

(iii) While appellees and the court below relied in a vague kind of way on *Hanson* in refusing to invalidate the agency-shop outright, it seems desirable in the interests of a thoroughly informed disposition of this case to deal also with *Lathrop v. Donohue*, 367 U.S. 820 (1961). *Hanson* plays so curious a rôle in the arguments and decision below that we have decided to consider it separately and at length in Part III., *infra* p. 187, in order to avoid fragmenting the analysis among the various parts of this brief to which it is relevant.

Because of its relevance uniquely to the point we are presently considering, however, *Lathrop* should be dealt with here.

Summed up, the Teachers' contention concerning *Lathrop* is two-fold: (A) that it stopped considerably short of deciding the fundamental constitutional issue here raised; (B) that, though clearly distinguishable, to the extent that it is relevant here *Lathrop* strengthens the Teachers' position that they may not be forced to finance organized economic, ideological, and political activities to which they are opposed.

(A) Reduced to its essentials, *Lathrop* affirmed a decision of the Wisconsin Supreme Court upholding its own authority to create an "integrated" state bar and to require every attorney in the state to pay annual dues to it. By admission of Justice Brennan, who wrote the plurality opinion; according to the heated objection of Justice Black, who dissented; and in the express view of Justice Harlan, who concurred specially—*Lathrop* decided nothing else. In short, because no majority was available which could agree both that the case was ripe for decision *and* on the ultimate First- and Fourteenth-Amendment issues, those issues, to the undoubted relief of some members of the Court and the exasperation of others, were completely avoided.

So clear is this fact that it appears starkly in headnote 3 of the decision:

3. The judgment is affirmed without passing on the conclusion of the Wisconsin Supreme Court that appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. Pp. 843-848.

That this headnote faithfully reflected the views of the Court's plurality is evident in these statements by Mr. Justice Brennan, who wrote their opinion:

We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free

speech are violated by the use of his money for causes which he opposes. Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in *Hanson*. * * *

* * * * *

We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. That issue is reserved, just as it was in *Hanson* * * *. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is *Affirmed*.

367 U.S. at 845, 847-48.

With customary vigor, Mr. Justice Black (dissenting) emphasized both the paradox that the peculiar line-up in the Court produced and the failure to decide anything which heightened the paradox:

[T]he only proposition in this case for which there is a majority is that the constitutional question is properly here, and the five members of the Court who make up that majority express their views on this constitutional question. Yet a minority of four refuses to pass on the question and it is therefore left completely up in the air—the Court decides nothing.

Id. at 866. Mr. Justice Harlan, who wished to affirm the Wisconsin Supreme Court's constitutional holding but could not command a majority for that purpose, also lamented the plurality's decision to avoid the constitutional question, which, he said, "should [not] be left in such disquieting * * * uncertainty." *Id.* at 848.

So far as the present case is concerned, then, the only possible conclusion is that *Lathrop* provides little or no guidance. The peculiar split of opinion permitted a minority of four Justices to override the desire of five others to confront the constitutional issue; and the result was that *Lathrop* made no contribution to constitutional law at all. The appeal might as well have been denied altogether. But if this Court is to make a practice of evading grave constitutional questions, as was done in *Lathrop*, the injury to the commitment to create a community enjoying liberty under law will far outweigh the benefits, frequently dubious, of postponing decision on pressing constitutional issues.

In a cosmic sense it may be unfair to burden mortal men with the heavy responsibilities that this Court is so often called upon to bear. Such a thought must have occurred more than once to its Members, as it doubtless has to all mature observers of the finality of the Court's decisions. Yet there is little to be done about it, if the Court is to serve its high purposes and ends. Mr. Justice Jackson said about all there is to be said on the subject in *Barnette*:

[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

319 U.S. at 640.

The issues in this case are over-ripe for decision. If the record as it exists does not satisfy the Court, the fault lies with appellees and the courts below, not with the Teachers. See *supra* pp. 18-20. If the Court is not willing to reverse the court below, purely and simply, then it should reverse and remand.

(B) There is no way in which *Lathrop* can properly be considered as a decision favoring the Board and the Union against the Teachers. Besides avoiding the constitutional question which the Teachers have raised, the decision in *Lathrop*, as far as it went, rested fundamentally on the fact that lawyers and their associations have always occupied a peculiar, *quasi*-governmental, rôle, one which made compulsory membership in the *state-created* integrated bar no more a violation of First-Amendment liberties than could be held to exist in virtue of the fact that taxes are compulsory; or that special assessments may be levied against those who benefit particularly and uniquely from certain public works; or that fees may be charged for certain licenses issued by the state. Cf. Justice Whittaker's concurring opinion in *Lathrop*, 367 U.S. at 865.

This Court and its Members, variously, have often noted the peculiar public character which lawyers acquire as court-officers. E.g., *Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ____ U.S. ____, ____, 96 S.Ct. 1817, 1831-32 (1976) (Burger, C. J., concurring); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 156-58, 170-73 (1971); *Spevack v. Klein*, 385 U.S. 511, 524 (1967) (Harlan, J., dissenting); *NAACP v. Button*, 371 U.S. 415, 455-56 (1963) (Harlan, J., dissenting); *Lathrop v. Donohue*, 367 U.S. 820, 849-50 (1961) (Harlan, J., concurring); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring).

The Union involved in this case, like all labor unions, and business enterprises, is a private, voluntary, strictly self-interested association. The integrated bar involved in *Lathrop*, to repeat, was a state-created agency designed among other things to prepare and propose legislation presumably designed to serve the common good. By no stretch of the imagination can it be concluded that the conception of the common good embraced by the Union in this case extends beyond the economic interests of its members. The economic,

political, and ideological activities of the Union, like those of any other private association, are self-serving. This is not intended as a condemnation of the Union. It is a statement of fact—of fact so clearly established and so widely known that the Court should not hesitate to take judicial notice of it, and in doing so, to recognize the distinction it works between this case and *Lathrop*. Cf. *infra* pp. 103-15.

To compel the Teachers to finance the activities of the Union is to compel them to support activities antagonistic to the interests of taxpayers and of the public agencies which employ the Union's members. See *infra* pp. 62-80, 147-86. It is a commonplace of the law and practice of labor relations that unions and employers are antagonists in the collective-bargaining relationship. Cf. *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960). While not nearly so widely recognized, it is nevertheless just as true that private-sector collective bargaining resolves itself ultimately into a conflict between the union and the customers of the employer; and that, as Justice (then Judge) Holmes said, the employer is really only the consumers' mandatary when he resists union demands. *Plant v. Woods*, 176 Mass. 492, 505 (1902) (dissenting opinion). In the same way, in public-sector bargaining, the ultimate conflict is between the union and the general public, particularly the taxpayers. To view public-sector unions as public-serving agencies, in the sense in which the *Lathrop* Court viewed the integrated bar, would be a gross mistake. *Lathrop*, therefore, can in no sense be considered authority against the Teachers, either in principle or on the facts.

e. Michigan may not do indirectly what it could not constitutionally do directly.

We have already shown, we believe, that the Michigan Legislature could not compatibly with the First and

Fourteenth Amendments directly compel all the public employees of the state to join or financially support unions as a condition of employment. We argue here, in a word, that what the Michigan Legislature could not constitutionally do directly, it should not be able to do indirectly by creating in pro-union public employees, public-sector unions, and agencies of the state acting as employers, powers which the First and Fourteenth Amendments deny to all government.

We start with the fact that nowhere in the Michigan PERA, Mich. Stat. Ann. §17.455(1) *et seq.* (1975 rev.), can one find a provision expressly requiring all employees to join or to pay dues to unions as a condition of employment by the state or by any of its subdivisions. What we find, instead, are provisions: (1) authorizing state-certification of unions as exclusive-bargaining representatives when they have been designated as such by a majority of employees in an appropriate bargaining unit, §17.455(11-14); (2) commanding all public employers to bargain collectively with the exclusive-bargaining representative in appropriate bargaining units, §17.455(15); (3) permitting public employers to make agreements with exclusive-bargaining representatives requiring "as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative", §17.455(10)(1); and (4) declaring, in the name of "stability and effectiveness of public-sector labor relations", a state policy in favor of compelling dissident employees to "share fairly in the financial support of their exclusive bargaining representative", §17.455(10)(2).

Summed up, the statutory scheme amounts to this: If a majority of the employees in an appropriate bargaining unit votes in favor of union representation, that union is authorized to demand and the public employer to require that *all* employees in the unit, including those who do not wish to do so, provide financial support to the union. As we shall see in

the next section of this brief, this is the same as saying that dissident employees must provide financial support for the essentially political activities which constitute the sum and substance of public-sector collective bargaining, as well as for such other political and ideological activities as the union, like any other private association, is privileged to pursue. This is what the Board and the Union have imposed on the Teachers in this case. It is what the Teachers object to most strenuously as a flagrant violation of their First-Amendment rights.

The Union succeeded in distorting the issues in the court below—and presumably succeeded at the same time in confusing the court below—by contending that *the Teachers* were seeking to restrain the constitutional rights of *the Union and its voluntary members!* In order to avoid straining this Court's credulity, we herewith present the following text from appellee Union's brief before the Michigan Court of Appeals:

We mean only to suggest that when plaintiffs [Teachers], whose right to speak in protest has in no way been stifled or limited [*sic*], say that the majority of their brothers may not speak for risk of offending plaintiffs (or some of them), plaintiffs seek to trade off the constitutional rights of many for the expression—not inhibited [*sic*]—of a few. *That* would present constitutional infirmities of the gravest order.

(R., Brief of Defendants-Appellees, Mich. Ct. App., Jul. 19, 1974, at 32.)

Let there be no doubt here of the real state of affairs; it is the exact opposite of the foregoing account. The Teachers have not in any way sought to dictate to or to exact money from the Union and its voluntary members. It is the other way around. The Union and its voluntary members have sought to compel the Teachers to support the economic, political, and ideological objectives of the Union—and by exactly so much to diminish the energies and the resources properly belonging to the Teachers to advance their own interests and causes. The fact is that the Teachers here stand in the same

position as the dissident appellees in *Barnette*. Like them, the Teachers want neither to push anyone else around nor to be pushed around themselves:

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

319 U.S. at 630-31.

While factually distinct, this case is very close to *Barnette* in constitutional principle. Both cases involve an intricate web of state compulsions and restraints. While deviously woven, those compulsions and restraints produce results incompatible with the First and Fourteenth Amendments. We have already shown that this is a true and pure state-action case. Behind the complex procedures for establishing the special privilege of exclusive representation, a privilege unknown to the common law, *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967), and forbidden at common law especially to public-sector unions, *e.g.*, *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875 (N.Y. Sup. Ct. 1943), the power of the State of Michigan as expressed in the PERA stands as the unique and exclusive source of both the Union's privilege to demand the agency-shop and the Board's power—its *unconstitutional* power, we contend—to grant it.

The teaching of all the state-action cases which the Court has handed down over the last generation, and more, is that no state may do indirectly by a grant of special privilege to a private group or of authority to an administrative agency that which the Constitution prohibits to direct legislative action. Cf. *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Terry v. Adams*, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring). Thus in *Smith v. Allwright* this Court held that the right to vote without discrimination cannot be "nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." 321 U.S. 649, 664 (1944). And in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, Mr. Justice Brandeis said for this Court that: "The federal guaranty of due process extends to state action through its legislative, executive, or administrative branch of government." 281 U.S. 673, 680 (1930). Literally dozens of other decisions to the same effect might be cited if the proposition were at all dubious. See the state-action cases cited *supra* note 3, and *supra* pp. 13-15. The still powerful, viable, and sternly constitutional decision of this Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), is especially relevant here for its uncompromising insistence that government may not delegate to majorities of private groups, power over minorities which the government itself could not exercise. The statute which it struck down, the Bituminous Coal Conservation Act of 1935, the Court said, conferred upon the majority of coal producers and miners

in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business * * *. The delegation is so clearly arbitrary, and

so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311.

It cannot be that the Michigan Legislature is competent to transmute a patently unconstitutional abridgment of the Teachers' speech, political, and associational rights into permissible regulation by delegating to employee-majorities, public-sector unions, and state administrative agencies discretionary, arbitrary, authority which the state itself does not possess. State-action is no less unconstitutional merely because it is deviously fragmented and shifts swiftly from locus to locus. If the cases we have just cited and quoted from mean anything, they mean that this Court will not allow the Bill of Rights to be fleeced by what amounts to a legislative shell game.

We have Mr. Justice Marshall's word, written very recently for the Court, that pro-union employees are entitled to no preferential position under the Fourteenth Amendment. *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802 (U.S. Jun. 7, 1976). This reassurance is nothing more than is to be expected from a Court which could produce the magisterial stand against invasions by majorities of the constitutional rights of minorities expressed in *Barnette*, 319 U.S. at 638:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

We have but one thing to add here. If duly constituted majorities of the electorate are not constitutionally authorized

to deal as they please with the Bill of Rights, it is impossible to see how a majority of employees in an appropriate bargaining unit, a public-sector union, and a public agency such as the Board can be collectively authorized to abridge the speech, associational, and political rights of the Teachers whenever they all get together and decide that it is their common will to do so.

3.

Since public-sector collective bargaining is inherently and unalterably political in character, and since the court below found that the Michigan PERA authorizes the Union to finance political activities with funds exacted from the Teachers, compelling the unwilling Teachers to pay dues and fees to the Union constitutes an a fortiori abridgment of their First-Amendment rights.

We argue here: (a) that as all government programs and expenditures take shape in a political matrix, public-sector bargaining, which has no purpose other than to influence the formulation and administration of such programs and expenditures, of necessity must itself become a part of the political matrix and is thus essentially political in character; (b) that requiring the Teachers to provide financial support to the union's activities compelled them, in violation of their constitutional rights, to contribute to a political process and to partisan political activity to which they were and are opposed; for (c) the Teachers have every right, both as educators and as citizens, to preserve unimpaired their professional, associational, and political autonomy.

a. Public-sector collective bargaining is an inherently political activity.

That all governmental programs and all phases of public administration are politically shaped may be a truism, but it acquires extreme significance when public-sector collective bargaining is examined against it. For if politics determine all governmental programs and all public administration, and if public-sector collective bargaining plays an integral part in this process, then it too acquires an inherently and ineradicably political character. And if public-sector bargaining is essentially a political activity, compelling the unwilling Teachers to finance it is a direct and substantial abridgment of their rights under the First and Fourteenth Amendments.

We emphasize that this conclusion does not rest solely on the assumption that public-sector unions generally – and the appellee Union involved in this case particularly – engage also in such partisan political activities as supporting and making political contributions to candidates for political office, providing testimonial dinners, and “get-out-the-vote” drives – the “nuts and bolts” of practical politics, as Mr. Alexander Barkan, Director of the AFL-CIO's Committee on Political Education once referred to them.¹⁹ Even if the Union's partisan activities were to be eliminated, which of course is not very likely, public-sector bargaining would remain an inherently political phenomenon. The invasion of the Teachers' rights, therefore, is only heightened by, it does not begin with or inhere exclusively in, the Union's partisan activities.

This case is here on what amounts to a demurrer, so that the Teachers' well-pleaded allegations must be taken as fact. See *Bielski v. Wolverine Insurance Co.*, 379 Mich. 280, 283, 150 N.W.2d 788, 789 (1967); *Schuh v. Schuh*, 368 Mich. 568, 572, 118 N.W.2d 694, 696 (1962). The Teachers alleged that, in

¹⁹“Political Activities of Labor”, 1 *Issues in Industrial Society* 23 (1969).

addition to the constitutional infirmities in permitting the Union to expend agency-shop fees on non-collective-bargaining matters, the mere requirement of financial support of its collective-bargaining activities is itself an abridgment of their First- and Fourteenth-Amendment freedoms (A. 13, 49-50). They further alleged "that collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs" (A. 12, 49). From the beginning the Teachers have contended that even in bargaining the Union is engaged in essentially political activities. *See, e.g., R., Brief for Plaintiffs on Motion for Summary Judgment at 16-17 (Mich. Cir. Ct., Dec. 18, 1969); Brief in Support of Claim of Appeal at 51 & n.25 (Mich. Ct. App., Apr. 11, 1974).* And, as we shall see, the Michigan Supreme Court has agreed as a matter of law that public-sector collective bargaining is inherently political. *See infra* p. 66.

Thus in a technical sense the Teachers' case is complete, and the absence of a full evidential record, while unfortunate, is not fatal. Still, since the Court has never before had occasion fully and directly to evaluate the relationship between public-sector collective bargaining and the Bill of Rights, it seems desirable to present here, as comprehensively and fairly as a reasonable respect for time- and space-limitations permits, the consensus of trained observers and commentators, as well as of participants, concerning the nature of collective bargaining in the public sector. In view of the general availability of the facts, opinions, and comments which we are about to present, there would seem to be no impropriety in the Court's taking judicial notice of them.

We emphasize at the outset that there *is* a consensus. A thorough search of the literature has turned up a wide variety of views on the pros and cons of public-sector bargaining and on the extent to which it should be encouraged or allowed.

But we have not found a single commentator on the subject who has expressed any doubt of the essentially political nature of collective bargaining in the public sector.

We list in the footnote a representative number of the writers, all competent students of the field;²⁰ and we quote here verbatim and as fully as we dare the relevant comments of other competent authorities. One more prefatory remark needs to be made. So far as their published writings disclose, none of the writers here quoted has expressed any hostility to public-sector collective bargaining. On the contrary, in the same works from which we quote they have all indicated that they believe it to be, under one or another kind of restriction, generally desirable.

This Court has itself recently had occasion to comment upon the political implications of public-sector bargaining and strikes. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 44 U.S.L.W. 4864, 4868 (U.S. Jun. 17, 1976). However, the most appropriate beginning for our survey of opinion on the political character of public-sector bargaining is the decision of the Michigan Supreme Court in

²⁰D. Bok & J. Dunlop, *Labor and the American Community* 331-338, 340 (1970); M. E. Dimock & G. O. Dimock, *Public Administration* 256 et seq. (4th ed. 1969); K. Hanslowe, *The Emerging Law of Labor Relations in Public Employment* 115-17 (1967); R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* 123 (1973); F.C. Mosher, *Democracy and the Public Service* 188 (1968) (public-sector bargaining "more nearly resembles standard interest-group tactics"); M.H. Moskow, J.J. Loewenberg & E.C. Koziara, *Collective Bargaining in Public Employment* 252-77 (1970); S.D. Spero & J.M. Capozzola, *The Urban Community and Its Unionized Bureaucracies: Pressure Politics in Local Government Labor Relations* 73 et seq. (1973) ("municipal collective bargaining quickly becomes a political contest"); O. G. Stahl, *Public Personnel Administration* 271 et seq. (6th ed. 1971); D.T. Stanley, *Managing Local Government Under Union Pressure* 18, 88, 136-152 (1972); J. Steiber, *Public Employee Unionism* 193 et seq. and passim (1973); K.O. Warner & M.L. Hennessy, *Public Management at the Bargaining Table* 318 et seq. (1967); J. Weitzman, *The Scope of Bargaining in Public Employment* 3, 7 (1975); H. Wellington & R. Winter, *The Unions and the Cities* 24-32 (1971).

Fire Fighters, Local 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). While the court split two-two on the question whether the Michigan law requiring compulsory arbitration of police- and fire-department labor disputes was an unconstitutional delegation of legislative power, three of the four justices expressly recognized the inherently political character of public-sector collective bargaining. In an opinion in which Chief Justice Kavanagh joined, Justice Levin said that:

The arbitrator/chairman of the panel is entrusted with the authority to decide major questions of public policy concerning the conditions of public employment, the levels and standards of public services and the allocation of public revenues. Those questions are legislative and political * * *.

394 Mich. at 241, 231 N.W.2d at 228; for Justice Levin's elaborations of the point, see 394 Mich. at 249-51, 256-57, 262-67, 231 N.W.2d at 232, 235, 238-40. Justice Williams spoke even more unambiguously:

[I]t is impossible to separate public-sector collective bargaining from other aspects of the political process.

394 Mich. at 293, 231 N.W.2d at 253.

Mr. Raymond D. Horton, in a careful study of the labor relations of New York City, has reached the same conclusion:

[M]unicipal labor relations is an inherently political process. The allocation of public money and the fixing of public and managerial policies, two major functions of the labor relations process, are central political acts in any organized society.

Municipal Labor Relations in New York City; Lessons of the Lindsey-Wagner Years 123 (1973).

In a seminal article on public-sector bargaining, Professor George H. Hildebrand was one of the first to bring out the intricate interplay of political forces that public-sector bargaining was bound to produce:

In the private sector the profit motive imposes its own discipline and accordingly supplies a strong incentive for unity, control, and centralized decision making by management's negotiating team. By contrast, within local government managerial authority is much less inherently likely to be cohesive. The reason is that it involves a multistage structure composed both of appointed executives and elected officials, with the latter in ultimate command. Political interests can assert themselves, and these can be divisive as easily as they can be unifying. The top officials are naturally sensitive to the wishes of the electorate, which includes voters in their capacities as taxpayers, members of unions, and users of public services. In comparison, those who control an agency – say, a sanitation department or a transit authority – are likely to be concerned with costs, efficiency, standards of service, and the power to manage.

Thus there exists an uneasy and potentially unstable relationship between the managers immediately "in charge" and the elected officials to whom they are responsible and upon whom they depend for their budgets and their jobs. The reason for this instability is that the situation is fraught with "politics," in the nonpejorative sense of the word.

On the one side, the managers normally have a professional interest in operating their agencies effectively and in protecting this function as best they can at the bargaining table, in much the same way as executives do in the private sector. In pursuit of this objective, they are acting on behalf of the interests of two important groups: the users of the service and the taxpayers who pay for it. On the other side, the function of the union is to promote and protect the interests of the employees, who constitute a legitimate "third estate" in this competition of aims. At the same time, however, the managers must depend upon the support of the elected officials in the pursuit of their professional interest.

On the other side, the elected officials *may* also share this managerial interest. But unlike the directors of a private corporation, they also have a second and quite separate interest: to stay in office. And they do that by maintaining a majority coalition among the electorate.

The decisive factor for them is the desires, expectations, and loyalties of that coalition. In other words, and still in the positive rather than the normative sense, it may pay to play pro-union politics or it may not, depending upon the composition and attitudes of the voting constituency. If it does not, the officials can back their managers to the hilt in negotiations, and a unity of interest can prevail that parallels the usual private-sector bargaining case. But if it pays to take the pro-union route, then the mayor and his council may well find themselves in the unhappy dilemma of dual allegiance – to their subordinate executives and to their voting constituents. Furthermore, an ably led union of public employees will be fully aware of this conflict of interest and naturally will be tempted to exploit it to its own advantage: it may make extreme demands in bargaining in order to create a crisis; and it may also seek to bypass the managers in hopes of getting a back-door deal directly with city hall.

"The Public Sector", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 131-32 (1967) (footnote omitted).

Professor Clyde W. Summers, a long-standing authority in the law of labor relations, has echoed Professor Hildebrand's opinion:

The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions. Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental processes; the problems of the public employer accommodating its collective bargaining

function to government structures and processes is what makes public sector bargaining unique.

"Public Sector Bargaining: Problems of Governmental Decisionmaking", 44 *Cinn. L. Rev.* 669, 670 (1975).

Professor John T. Dunlop, formerly Secretary of Labor, has remarked the far-reaching political influences of public-sector bargaining and strikes:

Strikes among some government employees at times have been directed less against the immediate government employing agency than toward securing for the agency appropriations or grants from the politically responsible executive or legislative body – that is, funds that are outside the resources of the agency. The strikes in New York City of teachers and of transport workers involved this factor, compelling the mayor and the governor to develop resources to meet the requirements of an acceptable settlement. The timing of budget making and collective negotiations in government employment is central to settlement of disputes; indeed, the failure of such coordination has been a major factor in some strikes of government employees. "It is a fundamental principle in government employment that collective negotiations and the resort to procedures to resolve an impasse be appropriately related to the legislative and budget making process."

"The Function of the Strike", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 109 (1967) (footnote omitted).

Mr. R. Theodore Clark, Jr., has not only noted the generally political character of public-sector bargaining but documented it with examples of the ways in which public-sector unions back up their bargaining demands with direct political action:

While there are many similarities in the collective bargaining process in the private sector and the public sector, there is one major and fundamental difference. Unlike the private sector, where collective bargaining takes place in an environment in which market forces

largely predominate, collective bargaining in the public sector must take place in a political environment. Despite this obvious fact, too little attention has been paid to the political aspects of public sector collective bargaining and the potential problems and distortions of the political process that will result if remedies are not instituted.

* * * * *

In order to appreciate the dimensions of the problem, it is necessary to set forth some representative examples of what is currently occurring in public sector collective bargaining.

Item. Mayor Moon Landrieu of New Orleans, Louisiana, testified before the Louisiana Legislature against a compulsory police and fire arbitration bill and was subsequently placed on the state AFL-CIO's blacklist. As a result, labor leaders boycotted meetings at which Mayor Landrieu was in attendance, including meetings with federal officials to discuss various federal programs.

Item. Mayor Wes Uhlman of Seattle, Washington opposed certain demands being made by municipal unions in Seattle and as a result these unions threatened political action against him. As Mayor Uhlman recently stated: "I have been faced with a threat of recall not once, but twice during the past year, both times for management decisions which I made, and which my appointed department heads attempted to implement." While Mayor Uhlman won the recall election by a nearly 2 to 1 margin, the critical fact is that the municipal unions were able to force a recall election. This tactic, the recall petition, "is perhaps the ultimate weapon for a public employee organization or any organized group. By judicious use of the recall petition, organizations can retaliate against officials who defy the organizations' mandates even when there is no election in sight."

Item. A police union in a Chicago suburb succeeded in electing several trustees to the village board of trustees and thereafter advised the village that if the village did not resolve a pending grievance in accordance with the union's wishes, it would pursue the "political route" regardless of the merits of the grievance.

Item. A candidate endorsed and wholeheartedly supported by a local teachers association in Illinois won election to the board of education and thereafter participated in executive sessions at which time the board's strategy and position on collective bargaining matters were discussed. Thereafter, the board member relayed to the teacher association's bargaining team the board's strategy.

Item. The fire fighters union in Syracuse, New York failed to negotiate a 40-hour week with city officials. Thereafter, the union succeeded in getting the state legislature to enact legislation establishing a 40-hour work-week. Thus, public employee groups are able from time to time to engage in "end-run bargaining" at the state level where the organizations are unable to achieve their goals at the local level.

Item. The mayor of Sacramento, California supported a city council resolution asking the governor to utilize state forestry fire fighting personnel during a strike by Sacramento fire fighters. As a result, he was censured by the Los Angeles County Federation of Labor. The motion of censure, in relevant part, stated:

This resolution was given searching consideration by our executive board, particularly as to the question of responsibility held by a representative of the labor movement elected to public office and what the labor movement has the right to expect from office holders put into their position through its efforts.

I don't suppose anybody can say that a labor endorsed candidate -- even one who earns his living directly within the labor movement [the mayor is the editor of the Sacramento Valley Union Labor Bulletin] -- should be expected to act as a rubber stamp, mindlessly acceding to every demand placed upon him. However, it must be held that any responsible liberal -- particularly one with ties to labor and especially one whose bread comes directly from labor -- can never be wholly indifferent to the obligations inherent in his relationship to organized labor.

This means, as we see it, that a person in your position ... should not arrogate to himself a stance of being above the battle. It is our feeling that his view of

the public good must at all times encompass the whole public good, including the welfare of the working people who are part of his constituency.

"Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem", 44 *Cinn. L. Rev.* 680, 682-83 (1975) (footnotes omitted). A virtually unlimited additional amount of similar comment could be culled from the learned journals, and we cite to some other articles in the footnote.²¹ We feel it more useful at this point, however, to refer to the (similar) opinion of practitioners in public-sector labor relations. Thus in a recent speech to the Industrial Relations Research Association, Mr. Donald H. Wollett, head of the New York State Employee Relations Department, spent most of his time emphasizing the permeatingly political environment of public-sector bargaining. See Bureau of National Affairs, *Government Employee Relations Report*

²¹Blair, "Union Security Agreements in Public Employment", 60 *Com. L. Rev.* 183, 194-96 (1975); Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 *Yale L.J.* 418, 428-32 (1970); Fellman, "Constitutional Rights of Association", in Kurland, ed., *Free Speech and Association: The Supreme Court and the First Amendment* 65-67 (1975) (gathering the authorities on the impermissibility of public-sector bargaining as an interference with normal political processes); Fleming, "Collective Bargaining Revisited", in Dunlop & Chamberlain, eds., *Frontiers of Collective Bargaining* 13 (1967); Klaus, "The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History", 67 *Mich. L. Rev.* 1033, 1065-66 (1969); Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 19-20 (1972); Siegal & Kainen, "Political Forces in Public Sector Collective Bargaining", 21 *Catholic L. Rev.* 581, 583, 585 (1972); Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974); Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 808, 847-52 (1970); Project, "Collective Bargaining and Politics in Public Employment", 19 *U.C.L.A. L. Rev.* 887 (1972).

(hereinafter "GERR") No. 659, at B6-9 (May 31, 1976). Likewise, Mr. Sam Zagoria, a labor relations specialist for many years, speaking to the Society of Federal Labor Relations Professionals, similarly studded his talk with references to the prevailingly political character of public-sector bargaining. *GERR* No. 631, at A2 (Nov. 10, 1975).

If we resort to the statements of public-sector union leaders, we find the same emphasis upon the fundamentally political character of, not only their activities, but also their conception of their proper rôle. Mr. Jerry Wurf, president of the American Federation of State, County, and Municipal Employees (AFSCME), typically speaks of public-sector collective bargaining as a "power relationship where public officials and policy makers respect you as equals and deal with you." Bureau of National Affairs, *Daily Labor Report*, Current Development Section (Jul. 5, 1973). And Mr. Wurf's "State of the Union" address to AFSCME delegates at the union's twentieth international convention was fully as permeated with political programs and political purposes as was the state of the union address of the President of the United States that year. *GERR* No. 559, at G1 (Jun. 17, 1974).

In a speech to the National Press Club, Mr. Terry Herndon, Executive Director of the National Education Association, made it clear that his union seeks a political voice equal to that of the electorate in determining the destiny — not merely of the public-school system — but of the whole of American society, in all the ways in which the NEA "perceives" as related to its political role and duty. We quote Mr. Herndon as reported in *GERR* No. 627, at B20 (Oct. 13, 1975) (emphasis supplied):

[We] perceive a right to broad scope collective bargaining. It is here that we can effect the policies and describe [sic] our professional security, degrees of freedom, support systems, administrative constraints, and economic well-being. We seek partnership with the public in determining these matters.

We perceive the absolute need and responsibility to exert maximum influence on the political system. It is here that the seeds of legislated reform are planted. Through legislation we seek adequate financial support, equitably distributed and fairly collected. We seek meaningful jurisdiction over licensing of teachers [s]o that historical wrongs in preservice and inservice education for teachers as well as research programs can be righted.

Finally, we perceive a need for a supportive political environment for an important and difficult work. This means an inspired and hopeful people which in turn means a courageous, creative, and honest leader — a President who understands the relationship between schools, money, politics, and nation building.

This agenda has attracted more than 1.7 million teachers. We are committed to its fulfillment.

Only a due respect for the requirement that argument be reasonably limited induces the Teachers to refrain from describing at length the rôle that public-sector bargaining has played in creating the current state of crisis which prevails in New York City (and other municipalities where public-sector bargaining has prevailed). Cf. R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* (1972). It will not be out of place to note in passing, however, that the political crisis brought about in New York City — in part, at least, by public-sector bargaining — has become a national political issue as well. See *The New York Times*, p. 42, cols. 7-8, Jun. 17, 1976, where it is reported, among other things, that Mayor Abraham Beame has assured federal officials that New York's municipal authorities would do what they could to keep the City's labor costs (all set in collective-bargaining contracts) from getting any further out of hand. See also *The Wall Street Journal*, p. 21, col. 2, Jun. 21, 1976.

The inherently political nature of public-sector collective bargaining is implicitly recognized in two recent decisions of this Court. In the first, *Hortonville Joint School District No.*

1 v. Hortonville Education Association, 44 U.S.L.W. 4864 (U.S. Jun. 17, 1976), the right of a school board to dismiss teachers who struck illegally was upheld. Chief Justice Burger, delivering the opinion of the Court, said:

The Board's decision whether to dismiss striking teachers * * * was not an adjudicative decision, for the Board had an obligation to make a decision based on its own answer to an important question of policy: what choice among the alternative responses to the teachers' strike will best serve the interests of the school system, the interests of the parents and children who depend on the system, and the interests of the citizens whose taxes support it? The Board's decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well. See Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974).

Id. at 4868 (emphasis supplied). The second case, *National League of Cities v. Usery*, 44 U.S.L.W. 4974 (U.S. Jun. 24, 1976), struck down the 1974 amendments to the federal Fair Labor Standards Act which extended the Act's minimum-wage and maximum-hour provisions to most state and local public employees. Wages and hours, of course, are the essential subject matter of collective bargaining. And this Court found in *National League of Cities* that a state's power to determine the wages and hours of its public employees is an "undoubted attribute of state sovereignty", *id.* at 4977, saying further:

Our examination of the effect of the 1974 amendments, as sought to be extended to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies.

Id. at 4979. By the same reasoning, collective bargaining in the public sector is a process of making "essential decisions

regarding the conduct of integral governmental functions." That is, it constitutes a political process. *See id.* at 4980.

The foregoing materials leave no room for doubt of the permeatingly political character of public-sector collective bargaining and hence of public-sector unionism.²² Every competent person who has expressed an opinion on the subject — whether as judge, disinterested student, or participant in the process — has emerged with the same conclusion: public-sector collective bargaining is an inherently and unalterably political activity; hence public-sector unions are of necessity political energumens. Every move they make, every goal they set, both shapes and is shaped by the political environment in which they operate. When the Teachers are required as a condition of their employment to finance the activities of the appellee Union, they are thereby forced to associate themselves, whether they like it or not, with a political and ideological program which they oppose. Such forced political and ideological conformity is incompatible with everything that this Court has had to say about the Bill of Rights from the beginning.

b. Forcing the Teachers to finance partisan political activities is unconstitutional.

The same conclusion is inevitable when we turn to an examination of the *partisan* political activities in which public-sector unions are compelled to engage as a consequence of the inherently political character of their collective-bargaining activities. The activities and expenditures of

²²For other judicial commentary viewing public-sector bargaining as political in character, *see* Winston-Salem/Forsyth County Unit, Educators Ass'n v. Phillips, 381 F. Supp. 644, 647-48 (M.D.N.C. 1974) (three-judge court); Pennsylvania Labor Rel. Bd. v. State College Area School Dist., ___ Pa. ___, ___, 337 A.2d 262, 264 (1975).

public-sector unions are as political in character when directed to such partisan activities as supporting the election of sympathetic public officials, or opposing the election of unsympathetic candidates, as they are when confined to the directly political activity called public-sector collective bargaining.

The Teachers' complaints allege that the Union engages in partisan political activities (A.12, 48-49). The Michigan Court of Appeals has held it reasonable to assume that a portion of every union's budget goes to such activities as the support of candidates for public offices and lobbying for the passage of legislation (A. 101). *Accord, Smigel v. Southgate Community School District*, 388 Mich. 531, 542-43, 202 N.W.2d 305, 308 (1972), *quoting Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963).

Thus there is no need to re-emphasize here the determination of all unions, public-sector as well as private-sector, to take an active, or more active, part in partisan politics. *Cf. GERR* No. 585, at A1 (Dec. 16, 1974); *id.* No. 613, at B4-5 (Jul. 7, 1975); *id.* No. 626, at B2-3 (Oct. 6, 1975); *Daily Labor Report* No. 28, at A3 (Feb. 10, 1976); *id.* No. 29, at A4 (Feb. 11, 1976). But an example close to this case may not be amiss:

[One of the anomalies] of collective bargaining in the public sector is that the union can often invade the management decision-making structure. Particularly in public school and junior college districts, organized teacher groups have succeeded in electing their members, relatives, or sympathizers to school and governing boards. Under these circumstances it is often impossible for the management decision-making group to hide its bargaining strategy and tactics from employees. Democratic government does allow almost anyone to run for office, but this tactic may make collective bargaining a farce.

Clark, "Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem", 44 *Cinn. L. Rev.* 680, 686-87 (1975), *quoting* Rehms, "Constraints on Local Governments in Public Employee Bargaining", 67 *Mich. L. Rev.* 919, 926 (1969).

The American Federation of Teachers, parent organization of the appellee Union (A.12, 24-25, 48-49), publishes regularly a journal called *AFT in the News*. A conservative estimate would put at 50 percent the proportion of this publication which is devoted to direct and express political action while the remainder is colored by the intrinsically political character of all the collective bargaining in which the unions affiliated with the American Federation of Teachers engage. See, e.g., "Union leader advises politicking for teachers", "TEACHERS KICK IN FUNDS FOR POLITICAL ACTION", *id.* Nov. 16, 1975.

AFT in the News for April 1976 reprints a story from the (Jacksonville, Fla.) *Times-Union* of March 28 of this year to the effect that the AFT Florida affiliate has called for removing the constitutional ban on a state income tax and for major changes in the present state tax structure because "the state will be unable to meet the growing government services needs of citizens under the present tax structure, and state taxing efforts are minimal in comparison to revenue potential." This is a valuable example of the relationship between the union's partisan political activities and its inherently political collective-bargaining activities. The Florida affiliate of the AFT is undoubtedly seeking an increased tax base in order to finance its collective-bargaining demands. *But suppose that individual teachers are more interested in keeping taxes down?*

The Teachers have alleged in the complaint, and averred in an affidavit, that the fees they are forced to pay to the appellee Union go in part toward financing the parent AFT, which publishes *AFT in the News*, as well as toward the appellee Union's inherently political collective-bargaining activities and its more directly partisan political efforts (see A. 12-13, 24-27, 48-49). May the Teachers constitutionally be required to help finance activities such as the foregoing — activities which militate equally against the interests of the political electorate and the Teachers' own convictions as citizens and professional educators?

c. Compulsory financing of the Union's political activities abridges the Teachers' rights as educators and citizens.

The Teachers believe that their rights both as citizens and as professional educators are infringed by the obligation which has been imposed upon them to finance both the inherently political collective-bargaining activities of the appellee Union and its more directly partisan political activities. They believe that they have a right both to refuse to finance political activities which they oppose and to maintain intact the resources they have earned in order uninhibitedly to pursue their own political and professional preferences.

The Teachers believe that theirs is an *a fortiori* case from *Pickering v. Board of Education*, 391 U.S. 563 (1968) — a decision which the appellees and the courts below have ignored. And they believe that *Hanson, Street*, and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)—upon which the appellees and the Michigan courts have exclusively relied—are in the main irrelevant to this case; but that, to the extent that they are relevant, they are authority for the Teachers, not for the Union or for the Board. As previously noted, we intend to deal separately with *Hanson, Street*, and *Allen* in Part III., *infra* p. 187, because of the reliance placed on them below.

Pickering held that under the First Amendment a teacher could not be discharged for having made (partly false) critical statements about the board of education which employed him. Such a discharge, the Court held, abridged the teacher's First-Amendment right of free speech. But forcing the Teachers in this case to support the political activities of the Union which they bitterly oppose violates not only their free-speech rights, but their freedoms of association and political autonomy as well. Their freedom of association is definitively abrogated, and their freedoms of speech and political autonomy are abridged to the extent that they are compelled to support political views to which they are opposed. If the teacher's right in *Pickering* was infringed, the

rights of the Teachers here have been triply infringed. That is why they believe that theirs is an *a fortiori* case from *Pickering*.

There can be no question in this case, as there was in *Pickering*, that the Teachers' conduct might in some way impair their teaching function or fall short when measured by a valid "job-related" set of standards. Cf. *Washington v. Davis*, 44 U.S.L.W. 4789, 4791 (U.S. Jun. 7, 1976). Forced payments to a union and excellence in teaching surely display no evident, rational relationship. See *supra* pp. 31-34, and *infra* pp. 132-37. If this Court has been correct in emphasizing the existence of a positive correlation between academic freedom and excellence in teaching, *Pickering*, 391 U.S. at 572; *Kevishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967), the exact contrary is more likely: that forcing the Teachers to pay tribute to an organization they despise, and to finance objectives to which they are opposed, will deaden their enthusiasm for a profession which, as anyone who has ever had anything to do with it knows, can mean everything to students and to society when practiced with enthusiasm, and worse than nothing where enthusiasm is gone.

So completely without redeeming quality do we believe the agency-shop in public education to be, that we cannot see how the Court can help finding against it. We will attempt now to show that what has been done to the Teachers is more than merely *prima facie* unconstitutional: it is absolutely and indefensibly unconstitutional.

II.

The agency-shop is a direct and broadly based attack on the Teachers' associational autonomy which not only finds no warrant in any substantial or legitimate state interest, but also frustrates achievement of the state's compelling duties to protect the values inherent in academic freedom, to preserve a genuinely representative government, and to prevent any impairment of governmental sovereignty.

We have established that the First and Fourteenth Amendments' guarantee of freedom of association necessarily implies an equivalent freedom of *nonassociation*, which secures for all individuals the constitutional privilege to refuse to contribute financial support to any private organization. We have therefore shown that the PERA agency-shop scheme is *prima facie* an infringement of the Teachers' freedom of association—an infringement exacerbated by the inherently political character of the Union's activities. *Supra* pp. 62-76. Now we shall apply to the agency-shop the constitutional tests appropriate where *prima facie* infringements of speech, association, petition, and other "preferred" freedoms are involved.

We begin with *United States v. O'Brien*, in which this Court drew upon a host of earlier decisions to define the limits of permissible governmental infringement of protected liberty as follows:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, * * * a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it

further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 376-77 (1968). *O'Brien* is an appropriate point of departure for our inquiry into the *per se* unconstitutionality of the agency-shop scheme, not only because of the careful detail with which it elaborates the elements of constitutional analysis applicable here, but also and especially because, with but a single exception, all of the precedents on which it relied were concerned with freedom of association. *NAACP v. Button*, 371 U.S. 415, 438, 444 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); and *Sherbert v. Verner*, 374 U.S. 398, 403, 406, 408 (1963) (freedom of religion). In *O'Brien*, this Court distinguished between two situations: first, it made clear that the exercise of a concededly delegated governmental power for the illegitimate purpose of suppressing First-Amendment liberty *as such* is unconstitutional *per se*. And secondly, it reiterated the familiar "balancing test" by saying that for government even incidentally to infringe First-Amendment freedom, albeit in the otherwise valid exercise of a delegated power for a legitimate purpose, is unconstitutional—unless the state demonstrates that that exercise serves a compelling public purpose by the means least restrictive of protected liberty.

We shall show here that the agency-shop scheme is unconstitutional under both the *per se* and the "balancing" tests. In Part II.A., *infra*, we shall demonstrate that the scheme is unconstitutional *per se* because it constitutes a *direct* attack upon the Teachers' freedoms of speech, association, and petition *as such*, for the benefit of a private organization the interests of which are not only distinct from

but even inimical to the public interest. In Part II.B., *infra* p. 115, we shall demonstrate that, even if the scheme were merely an *indirect* infringement upon the Teachers' First- and Fourteenth-Amendment liberties, it would nevertheless be unconstitutional on its face because it is not the least-restrictive means necessary to achieve a substantial public goal, but rather is an overbroad delegation of power to a private organization. And in Part II.C., *infra* p. 147, we shall demonstrate that no justification could exist for the scheme because it inexorably interferes with the state's fulfillment of at least three compelling public duties.

A.

The agency-shop scheme is a direct attempt to suppress the Teachers' First- and Fourteenth-Amendment freedoms as such for the benefit of the Union.

Although this Court has decided the majority of cases raising alleged violations of the First Amendment by application of the "balancing test", it has explicitly recognized in *O'Brien* and other decisions that it cannot decide all such cases on the basis of that test. While First-Amendment freedoms may not be "abstract absolutes", in the sense that they may never be regulated, limited, or infringed in any way or for any reason, there do exist certain categories of invalid state-action with respect to which the very terms and logic of the Constitution preclude any recourse to "weighing of interests". For example, as Mr. Justice Black long maintained, and many decisions hold, First-Amendment liberties, including freedom of association, are beyond the reach of legislation that *directly* restrains their exercise *as such*. The First Amendment's categorical ban against such "abridgments" thereby recognizes that there is at least some measure of free speech, association, and petition

which no government under our constitutional system may deny to any of its citizens for any reason. And this recognition thereby guarantees a preserve for individual autonomy, in which deliberate and purposeful state interference with protected liberty *as such* is always intolerable and unjustifiable. *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (Black, J., concurring); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Thomas v. Collins*, 323 U.S. 516, 543 (1945); *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965); *Gooding v. Wilson*, 405 U.S. 518, 527 (1972).

Specifically, this Court has indicated in several opinions that, under appropriate circumstances, freedom of association is an *unconditional* personal liberty. Compare *United States v. Robel*, 389 U.S. 258, 263 (1967), and *Shapiro v. Thompson*, 394 U.S. 618, 643 (1969) (Stewart, J., concurring), with *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972). These statements point to a judicial consensus approaching unanimity that freedom of association is, to some significant degree, *inviolable*. And they affirm the observation of Mr. Justice Douglas that, in some very important particulars, government is *powerless* to legislate with respect to membership in a private organization *regardless of the legislative purpose sought to be served*. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 565 (1963) (concurring opinion). Compare, e.g., *In re Stolar*, 401 U.S. 23, 27-28 (1971) (Black, J., for the Court), with *id.* at 35-36 (Harlan, J., separate opinion).

The PERA agency-shop scheme constitutes the sort of pervasive and purposeful state interference with the Teachers' First- and Fourteenth-Amendment freedoms that the constitutional principles enunciated in the latter decisions outlaw. For

as we shall show in Part II.A.1., *infra*, the scheme is nothing less than a paradigmatically *direct* attack on the Teachers' associational autonomy *as such*. And as we shall show in Part II.A.2., *infra* p. 99, it is not merely an inadvertent abuse of a delegated power, but the exercise of an authority not conferred by our Constitution and in violation of the first principles of our system of limited, republican government. Cf. *McCray v. United States*, 195 U.S. 27, 64 (1904); *Citizens' Savings & Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655, 662-63 (1875).

1.

By requiring them financially to support the Union, the agency-shop scheme abridges, rather than merely "regulates", "limits", or "infringes" the Teachers' First- and Fourteenth-Amendment freedoms.

In a number of decisions, this Court has had occasion to define the fundamental constitutional distinction between *direct* and *indirect* infringements upon protected liberty as the distinction between state-action *that attempts to control the content of protected activity as such*, on the one hand, and state-action *that attempts to regulate conduct itself unrelated to the exercise of the freedoms of speech, association, or petition*, on the other. And it has had occasion to emphasize that, if the latter is permissible under extraordinary circumstances, the former can never be under any circumstances. For the meaning of the First and Fourteenth Amendments is that *government has no power to foster orthodoxy of thought and action*, either by restricting "deviant" expression and association, or by extending unusual protection, encouragement, and support to officially acceptable ideas or groups. The Constitution disables the state from controlling the *content* of the exercise of any protected liberty—whether government seeks to *prevent* an individual

from speaking, associating, or petitioning because of the subject-matter of his speech, or the identities of his associates; or to *compel* him to speak, associate, or petition so as to promote a favored viewpoint or to advance a particularly influential group. *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Cohen v. California*, 403 U.S. 15, 24 (1971); *Chicago Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974) (White, J., concurring); *Board of Education v. Barnette*, 319 U.S. 624, 633, 642 (1943).

Moreover, since constitutional guarantees protect the substance of individual liberty against subtle as well as heavy-handed interference, government has no greater power to employ devious devices—in the guise of “taxes” or otherwise, and whether directly or in league with private parties—either to stifle speech and association, or to compel them. See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Miami Herald Publishing Co.*, 418 U.S. at 256.

The PERA agency-shop scheme is at war with these First-Amendment principles, for two reasons: (a) Rather than a mere “regulation” or “limitation of”, or an “incidental infringement upon”, the Teachers’ conduct which is *unrelated* to their exercise of the freedoms of speech, association, and petition, the scheme constitutes an attempt by the Board and the Union directly to control the content of that exercise as such—by subordinating the Teachers to the Union, politically and ideologically, through forced financial support of its activities. (b) In so doing, the scheme stifles their freedom of self-determination, the freedom which is the core value, not only of the First, but also of every other Amendment set out in the Bill of Rights. Cf. *supra* pp. 62-80.

a. The agency-shop scheme is a direct invasion of First- and Fourteenth-Amendment freedoms as such.

In *United States v. O'Brien*, this Court delineated the preconditions necessary for application of the “balancing test” by holding that, when “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the “nonspeech” element can justify *incidental* limitations on First-Amendment freedoms. 391 U.S. 367, 376 (1968). As described in *O'Brien*, then, the test applies *only* to *indirect* infringements upon speech, association, or petition which arise inadvertently out of otherwise valid regulation of conduct itself unrelated to the exercise of First-Amendment freedom. It is inapplicable by hypothesis to a direct infringement on *pure* speech, association, or petition. And any such infringement is unconstitutional *per se*, no matter what governmental interests it purportedly serves.

On its face, the agency-shop scheme imposes onerous restrictions on far more than conduct *unrelated* to speech, association, or petition. *For the course of conduct involved when the Teachers withhold financial support from the Union, or otherwise refuse to associate with it, contains no element not integrally and inextricably related to their exercise of the freedoms not to speak, not to associate, and not to petition.* Conversely, when the Union, under color of the agency-shop arrangement, compels the Teachers to contribute financial support to its inherently political collective-bargaining activities, to that extent it extinguishes their fundamental freedom not to associate with a private, politically oriented organization. And when it expends those monies (as the statute authorizing the agency-shop scheme permits and encourages it to do) on political and ideological activism, propaganda, agitation, lobbying, and other activities intimately related to speech and petition both within and outside of the collective-bargaining process, it extinguishes as

well the Teachers' fundamental freedoms not to speak in support of political causes and candidates, not to lobby or petition government on behalf of particular policies and programs, and generally not to participate in the promotion of ideas (irrespective of whether they agree or disagree with those ideas). *See supra* pp. 40-56, 62.

If Union representatives approached any of the Teachers and said: "You must extol the merits of our organization to nonunion public employees"; or "You must participate at our meetings in the formation of collective-bargaining and other political strategies"; or "You must appear at a public session of the Board and speak on behalf of our position in the pending negotiations"; or "You must repair to the capitol and lobby for measures in our economic interest"; or "You must draft articles for a union newspaper to convince citizens that our political goals are in the public interest"; or "You must encourage voters to support candidates favorable to us at the next election"—if, indeed, the Union straightforwardly demanded any of these things from the Teachers, and enlisted the power of the state to coerce their compliance with its demands, would the appellees have the temerity to deny, or would this Court hesitate to declare, that such compulsion was repugnant *per se* to the First and Fourteenth Amendments? This, of course, is not the Union's way. Unlike the simple and romantic highwayman who cried "Stand and deliver!", the Union resorts to a more sophisticated and far safer means to "redistribute wealth" from the Teachers' salaries to its political schemes: the agency-shop "check off". But the overall result is the same. Through the expenditure of the agency-fees, the Union in effect coerces the Teachers' participation at union meetings; their public praise for the organization, its activities, and its principles; their presence before the Board and their petitions in executive and legislative chambers pressing the Union's position on administrators and lawmakers; their propaganda among the general public; and their preachments for candidates and causes from

political pulpits. And, if doing these things by engaging with the state to compel the Teachers' physical presence and performances would violate the First- and Fourteenth-Amendments' ban against enforcing political and ideological conformity, can there be any constitutional difference where the Union arranges with the Board regularly to siphon off portions of the Teachers' salaries to surrogates who will act in their stead with the stored up (and, indeed, more easily managed) value of their previous labors? Are not both situations, for all logical and constitutional purposes, identical?

We believe they are. And more importantly, we believe that, because they are, this Court will refuse to characterize the workings of the agency-shop scheme as a mere "regulation" or "limitation" of some (undefined) conduct of the Teachers *unrelated* to the exercise of their First-Amendment freedoms, but instead will identify the scheme as in effect a direct "tax" on the exercise of a set of fundamental freedoms—a "tax" on belief, expression, and association applicable to all public employees in Michigan who eschew affiliation with labor unions. For that, in essence, is what it is. And, as such, it is a *direct* infringement, or *abridgment*, of the Teachers' liberty—in the truest sense, a *literal violation of the First and Fourteenth Amendments*.

Nearly twenty years ago, this Court denied the State of California the power to withhold a tax exemption from an individual because of his ideological support for politically subversive ideas and causes. *Speiser v. Randall*, 357 U.S. 513 (1958). Today, the State of Michigan purports to "tax" those of its public-school teachers who *refuse* to support labor organizations because it considers their refusal subversive. The parallel renders poignant the observation of Mr. Justice Black on that earlier occasion, that "a levy of this nature is wholly out of place in this country" and "constitutes a palpable violation of the First Amendment." And even more now than then is there wisdom in his warning that the necessity to

consider the invalidity of such an affront to the Constitution in this Court "only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment." *Speiser*, 357 U.S. at 529-30 (concurring opinion). For, in operation and effect, the agency-shop scheme (as construed by the Michigan Court of Appeals) constitutes a classic *prior restraint* on the freedoms protected by the First and Fourteenth Amendments. It is a novel and peculiarly vicious *form* of restraint, to be sure, since it strikes selectively at the "negative" liberties secured by those Amendments. But it is in *substance* the same sort of device which crops up generation after generation to serve the desire of a prevailing orthodoxy for censorship—and which, again and again, this Court has held out of place under our constitutional system.

A "restraint", in the most general sense, is a penalty or deprivation which the state (unconstitutionally) imposes on an individual for exercising his First-Amendment freedoms. Thus, if the state requires payment of a "license fee" as a prerequisite to permitting speech, it imposes on the individual a restraint on his "positive" freedom. If, conversely, the state requires speech as a prerequisite to receipt of a benefit to which the recipient would otherwise be entitled, it imposes on the individual a restraint on his "negative" freedom to remain silent. And similarly for the freedoms of association, petition, and the press. In this case, the State of Michigan requires the Teachers to acquiesce in a process through which they are "taxed" to finance the political and ideological activism of the Union as a condition of continued public employment in the Detroit schools. This is a restraint on both their "positive" and their "negative" First-Amendment freedoms. It is a restraint on their "positive" freedoms for the simple reason that every dollar of their financial resources which the state "taxes" from them because of their nonassociation with the Union is a dollar they cannot invest in the promotion of their own ideas and values. See *Seay v. McDonnell Douglas*

Corp., 427 F.2d 996, 1004 (9th Cir. 1970). And it is a restraint on their "negative" freedoms because every dollar of the agency-shop "tax" is immediately directed into a program of political and ideological activism the precise purpose of which is to promote ideas and values which the Teachers, by their very nonassociation with the Union, have demonstrated they oppose in principle and practice. Cf. *Cort v. Ash*, 422 U.S. 66, 84 (1975).

In the case of both "positive" and "negative" restraints, the state (or some private party acting in complicity with it) serves as a licensor, or censor, of (for example) speech. In the case of a restraint on "positive" freedom, however, the state may very well exercise no substantive control over what is said, or by whom, preferring merely to "tax" the privilege of speaking *per se*. It is possible, therefore, to imagine a restraint of this type as operating in a "neutral" fashion—that is, restricting all communication equally, without discrimination among speakers or ideas. Whereas, in the case of a restraint on "negative" freedom such as the agency-shop scheme, the very purpose of the exaction is precisely to compel particular kinds of speech by particular persons. A "negative" restraint of this kind, therefore, is decidedly more odious than a "positive" restraint that merely burdens (albeit unconstitutionally) the privilege of speech but does not extinguish it.

All such restraints, we submit, are unconstitutional *per se*. For our Constitution presupposes that each individual will be able to exercise and enjoy *all* of his fundamental rights, powers, privileges, and immunities *simultaneously*. He need not sacrifice his right to property in order to exercise his "positive" freedom of speech. And he need not acquiesce in a denial of an equal opportunity to serve as a public employee in order to exercise his "negative" freedom of speech, either.

We put forward these hopefully self-evident propositions, because we recognize that, generally speaking, history has witnessed "positive" restraints in profusion, but few "negative" ones. This perhaps can be traced to the reluctance of

governments, prior to the twentieth century, to interfere with the personal beliefs of their citizens so long as those beliefs did not manifest themselves in overt criticism of the ruling stratum of society. With the emergence of totalitarian ideologies in modern times, however, came demands that the citizens not only refrain from criticism of the state, but also affirmatively "love Big Brother", by constant professions of allegiance to and faith in the state, the party, or the leader. And, as this case witnesses, such ideas have now been put into practice by associations other than the state.

In numerous decisions, this Court has condemned as unconstitutional *per se* restraints upon the "positive" freedoms of speech, association, and assembly. When a regulation strikes at the very foundation of First-Amendment liberty by subjecting it to license and censorship, this Court has never hesitated to declare that regulation invalid on its face, regardless of the legislative motive which induced its adoption. *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); *accord, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Staub v. City of Baxley*, 355 U.S. 313, 321-25 (1958). No rational basis exists for applying a contrary rule where, as here, the state attempts to subject the freedoms not to speak, not to associate, and not to petition to the capricious power of a private licensor.

The immunities guaranteed by the First and Fourteenth Amendments invalidate *all* governmental restraints upon the arena of public discussion, in the belief that no other approach comports with the premise of human dignity and choice upon which our political system rests. *Cohen v. California*, 403 U.S. 15, 24 (1971), *citing Whitney v. California*, 274 U.S. 357, 375-377 (1927) (Brandeis, J., concurring). If this respect for and reliance upon individual autonomy animates the "positive" protections of the First and Fourteenth Amendments, it inspires even more insistently

the security those Amendments provide for the "negative" freedoms of silence, individuality, and political independence. For "the right to remain silent in the face of an illegitimate demand for speech" is not merely "as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence." *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 634 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). Rather, if any hierarchy exists among fundamental personal liberties, it entitles the freedoms to refrain from speech, association, and petition to a position even more "preferred" than that of the freedoms to speak, associate, or petition. Since our Constitution grudgingly tolerates censorship or suppression of First-Amendment liberty only under the most extraordinary and clearly demonstrated circumstances of grave and imminent public danger, it follows that the state can command involuntary affirmation or association (if at all) only on grounds even more immediate and urgent. *Compare Bridges v. California*, 314 U.S. 252, 263 (1941), with *Board of Education v. Barnette*, 319 U.S. 624, 633 (1943).

Therefore, the prior restraint worked by the agency-shop scheme here is beyond constitutional redemption. "If there is any fixed star in our constitutional constellation", wrote Mr. Justice Jackson, "it is that no official, high or petty, can prescribe what shall be orthodox in politics * * * or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642, *quoted in Street v. New York*, 394 U.S. 576, 593 (1969). And what the state itself may not restrain is certainly beyond the censorial competence of private parties "negotiating" with government officials under color of delegated authority. *See supra* pp. 56-62. Having no power itself to abridge First- and Fourteenth-Amendment liberty, the Michigan Legislature cannot grant the power to the Union to do so—through "contracts" with the Board, or otherwise. *International Association of Machinists v. Street*, 367 U.S. 740, 777 (1961) (Douglas, J., concurring).

b. The agency-shop scheme denies the Teachers their freedom of self-determination.

The agency-shop scheme is not merely a direct invasion of First- and Fourteenth-Amendment liberties in the form of a prior restraint upon the Teachers' freedoms not to speak, not to associate, and not to petition. It is also an attempt by the Board and the Union, under color of state law, to suppress the Teachers' political and ideological autonomy. And, as such, it constitutes a naked assault upon the most basic and precious value inherent in our Constitution.

It is a truism of our constitutional jurisprudence that the ultimate purpose of the First and Fourteenth Amendments is to preclude the state from dictating how individuals should exercise their fundamental liberties of speech, association, and petition. It is a truism—but it embodies a proposition far from trivial. The Founders of our Republic knew that different eras must struggle with the demands of different orthodoxies, but that the contradiction between state-imposed conformity and individual human dignity never varies. Too wise and too humble to cast themselves in the rôles of omniscient “guardians” capable of giving permanent substantive content to men’s beliefs, they were also too conversant with the history of tyranny to believe that such self-styled “guardians” of thought and action might not someday appear. Therefore, they carefully designed the First Amendment, and the whole Bill of Rights, to preserve inviolate an area for individual free choice—to prove that their Constitution did not delegate an all-embracing totalitarian authority to the state in the realm of beliefs and associations.

The Amendments they drafted, and especially the First, protect rights and privileges essential to the workings of a free society. But, if so, then in the very nature of things the exercise of the liberties those Amendments guarantee can never be the subject of governmental dictation. Liberty, strictly speaking, does not exist with respect to any action

that the state can compel; and if there are no actions that the state cannot compel, freedom (in a constitutional sense) is nonexistent. A people cannot be free if the liberties essential to their freedom are not privileges, but duties; not immunities, but liabilities. Therefore, the essential and defining characteristic of any freedom, and especially a *fundamental* freedom, is that its exercise always remains a matter of untrammelled individual choice and judgment. See, e.g., *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975) (freedom of association), *cert. denied*, ___ U.S. ___, 96 S. Ct. 1147 (1976).

In *Board of Education v. Barnette*, this Court explicitly recognized that the exercise of the freedom secured by the First and Fourteenth Amendments is itself the subject of a further, and even more basic freedom: the freedom of self-determination. Invalidating a requirement that dissenting public-school students conform ideologically by reciting a pledge of allegiance, the Court found that:

The freedom asserted by [the students] does not bring them into collision with rights asserted by any other individual. * * * [T]he refusal of these persons to participate in the [flag-salute] ceremony does not interfere with or deny the rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and the rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

319 U.S. 624, 630-31 (1943) (emphasis supplied). More recently, this Court re-emphasized the centrality of the freedom of self-determination to our system of constitutional immunities for the individual, when it held that a defendant in a criminal case has a constitutional right and privilege to represent himself. As Mr. Justice Stewart observed on that

occasion, "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice". *Faretta v. California*, 422 U.S. 806, 833-34 (1975) (Sixth Amendment).

Barnette and *Faretta* thus recognize a fundamental principle that permeates the entire structure of our Constitution and speaks with a voice of equal eloquence and vigor from the platform of each of the Articles of the Bill of Rights. Each Amendment guarantees a particular freedom directly and personally to the individual. And the structure of each necessarily implies the further inherent and inalienable right to self-representation in the exercise and enjoyment of that freedom—a right for each individual personally to decide whether the exercise or nonexercise of some guaranteed liberty is to his advantage in his particular circumstances.

In its necessary operation and effect, the PERA agency-shop scheme is an unequivocal contradiction of the Teachers' freedom of self-determination. To the extent that they are required to finance the Union's political and ideological activism as a condition of continued public employment, the Teachers no longer direct their own socio-political destinies. Instead, the scheme degrades them to the status of captive workers financially shackled for the advancement of a militantly activist movement with the goals and methods of which they vigorously disagree, and over the direction of which they have neither control nor influence. This result is not the freedom of self-determination in political affairs which is the cornerstone of our limited, republican government. Cf., e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). Neither is it any form of "freedom" compatible with the libertarian presuppositions of our Constitution. Rather, it is a new species of ideological serfdom at war with the belief in personal choice, self-determination, self-fulfillment, and (ultimately) individual human dignity upon which our

forefathers premised the American social and legal systems.

There is no place here for the argument that the agency-shop scheme is in any way "necessary" to "balance 'competing rights' ". For no such "competition" exists. The refusal of the Teachers to participate in or support the Union's political and ideological activism does not and cannot deny or interfere with the liberty of others to do so. The sole "conflict", then, arises from the demand of the Union to impose its orthodoxy upon dissenters, and from the complicity of the State of Michigan in the Union's design to compel the Teachers to "love Big Brother". This is a conflict not between "competing rights", but between liberty and tyranny—between freedom of self-determination in belief, expression, and association on the one hand; and political thought-control, on the other.

To be sure, the Union may in fact expend monies coerced from the Teachers through the agency-shop scheme to support political action arguably favorable to them. But fortuitous "benefits" of this kind cannot insulate the scheme from constitutional condemnation. For, as Mr. Chief Justice Burger has said, "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. Post Office Department*, 397 U.S. 728, 738 (1970). After all, the very purpose of the Bill of Rights was to free people from governmental interference with their affairs, whether in the purported interest of their "welfare" or otherwise. Therefore, there is no place either in constitutional analysis generally, or in this case particularly, for application of the vicious philosophy that limitations on governmental power may be brushed aside on the plea that "good", perchance, may follow. *Schneider v. Smith*, 390 U.S. 17, 25 (1968); *Jones v. SEC*, 298 U.S. 1, 27 (1936).

In the final analysis, moreover, any "weighing" of the possible "benefits" from the agency-shop scheme would be, not only an exercise in supererogation, but also a perversion of constitutional principle. On its face, the scheme is the

source of irreparable injury to the Teachers. For once the Union has expended coerced monies to promulgate its political and ideological viewpoints and to apply its political influence in collective bargaining and otherwise, the effect of that spending cannot be withdrawn from the marketplace of ideas, the voting booth, the legislative chamber, or the negotiating process. See *Cort v. Ash*, 422 U.S. 66, 84 (1975). Admittedly, the exact financial *quantum* of harm occasioned by the agency-shop may be difficult to prove. But, as Mr. Justice Douglas observed in a related context, the unconstitutionality of such a scheme "turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government." *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (concurring opinion). The harm, in short, is the interference with the Teachers' intangible but invaluable freedom of *self-determination*, a harm as plain here as it is in contemporary totalitarian states, where tyrannically paternalistic "vanguard parties" purport to shape the political and ideological destinies of dissenting citizens. And, given that harm, only one result is constitutionally conceivable.

If, as this Court held in *Barnette*, the freedom of self-determination permits individual public-school students to refuse to conform to the ideological prescriptions of the state; and if, as this Court held in *Faretta*, the freedom of self-determination permits an individual criminal defendant to refuse to accept a spokesman designated by the state—then surely here this Court must hold that the same freedom secures for the Teachers both a privilege to refuse to extend to the Union the unlimited discretion to spend their money on political and ideological activism, and an immunity from compulsion under color of law to accede to such spending. After all, there is no rational basis on which to distinguish, for constitutional purposes, between compelled affirmation or acceptance of counsel, on the one hand, and compelled

financial support of the political and ideological activism of a trade union, on the other. For, with respect to the freedom of self-determination, "a trade union [is] the same kind of protector of [one's] interests as an official lawyer before a tribunal". 2 A. I. Solzhenitsyn, *The Gulag Archipelago*, 1918-1956, at 607 (T. P. Whitney transl. 1975).

2.

The agency-shop scheme compels the Teachers to advance the private interests of the Union at the expense of their own First- and Fourteenth-Amendment freedoms.

This observation of a profound student of contemporary affairs points up another, and perhaps decisively, critical defect in the PERA agency-shop scheme: namely, that it elevates the interests of the Union over the interests of both the Teachers and the public. We shall deal in detail with the adverse effect of the agency-shop on the public interest *infra* pp. 147-86. Here we shall show: (a) that there is nothing in the nature of public-sector unions generally, or of the appellee Union specifically, which suggests any peculiar justification for subordinating the Teachers to it through the agency-shop scheme; and (b) that the logic of collective bargaining exposes the entire process as one designed to advance the special interests of the Union.

a. The Union has no special privilege to abridge the Teachers' First- and Fourteenth-Amendment freedoms.

Although unions themselves are (as it were) embodiments of the exercise of freedom of association, they enjoy no special legal status as against nonunion employees on that account. Therefore, even though the agency-shop scheme

promotes the capacity of union members to compel others to associate, speak, and petition with them, and in that sense might be said to enhance their union's potential for political activism, it is not in virtue of that result insulated from constitutional scrutiny. To the contrary. For, to the extent it secures such a benefit for union members, it does so only by imposing on dissenters a corresponding cost in terms of denials of the latter's fundamental freedoms of association, speech, and petition. And our Constitution recognizes no right or privilege in any group to attempt to enhance the exercise of its own members' liberty by restricting the otherwise equal liberty of nonmembers—either by demanding special concessions from the state, or by seeking to enforce oppressive agreements to the detriment of nonsignatory third parties. See, e.g., *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949); *Buckley v. Valeo*, — U.S. —, —, 96 S. Ct. 612, 648-49 (1976); *City of Charlotte v. Local 660, Firefighters*, 44 U.S.L.W. 4801, 4802-03 (U.S. Jun. 7, 1976); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Neither can the appellee Union claim a special position because it adventitiously numbers among its members a majority of the employees in the collective-bargaining unit to which the Teachers have been assigned. For our Constitution does not recognize any doctrine of unlimited majority rule, whether the majority is composed of one's co-workers, one's "class", or one's countrymen. Rather, it conditions the exercise of all governmental authority on the state's recognition and protection of the basic individual liberties enumerated in the Bill of Rights, in effect permanently withdrawing the subject-matter of those liberties from the vicissitudes of political controversy—whether in the electoral process, the legislature, or the administration of public employment. E.g., *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943); *Gordon v. Lance*, 403 U.S. 1, 6 (1971); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713;

736-37 (1964); see *Kingsley International Pictures Corp. v. Regents of New York University*, 360 U.S. 684, 689 (1959); *State v. Nemaha County*, 7 Kan. 549, 555 (1871) (Brewer, J., dissenting).

Nor can the Union rely upon its status under Michigan law as an exclusive representative. This appeal does not present the question of the unconstitutionality of exclusive representation in public employment. None the less, exclusive representation colors the issue raised here because of the statement of the Michigan Legislature that the purpose of the agency-shop scheme is to compel all employees in a bargaining unit to "share fairly in the financial support" of a majority union. PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.). We do not suggest, however, that this Court grapple with the complex problem of exclusive representation in the instant proceeding. Indeed, quite the opposite. E.g., *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). But we do submit that this Court should be alert to, and should not countenance, any attempt by the Union or the Board to shield the question of the unconstitutionality of the agency-shop behind that of exclusive representation. Exclusive representation can provide the Union with no support for two reasons:

(i) Neither the process of collective bargaining nor the status of an exclusive representative is constitutionally mandated in the public sector. Both are mere statutory privileges. E.g., *Lontine v. Van Cleave*, 483 F.2d 966, 968 (10th Cir. 1973); *Local 1954, Teachers v. Hanover Community School Corp.*, 457 F.2d 456, 461 & n.13 (7th Cir. 1972); *Vorbeck v. McNeal*, 407 F. Supp. 733, 739 (E. D. Mo. 1976) (three-judge court), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976); *Confederation of Police v. City of Chicago*, 382 F. Supp. 624, 628-29 (N.D. Ill. 1974); *Local 794, Firefighters v. City of Newport News*, 339 F. Supp. 13, 16-17 (E.D. Va. 1972) (three-judge court); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969)

(three-judge court). And inquiry into the unconstitutionality of the agency-shop scheme in its own right cannot be avoided simply because that scheme is an incident of the PERA plan for exclusive representation. Indeed, to admit otherwise would be to cast aside the rule that statutes (such as the agency-shop scheme) which infringe First- and Fourteenth-Amendment freedoms are presumptively unconstitutional. *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963). See *infra* pp. 117-20.

(ii) Far from being a constitutional *right*, exclusive representation in public employment may well be a constitutional *wrong* no less (and perhaps more) repugnant to our system than the agency-shop. Aspects of its invalidity are pending before this Court in another case; and a broadly based constitutional challenge may soon be presented for review. *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission*, *prob. juris. noted*, ___ U.S. ___, 96 S. Ct. 1408 (1976); *Knight v. Minnesota Community College Faculty Association*, No. 4-74 Civ. 659 (D. Minn., filed Dec. 19, 1974), *petition for mandamus granted sub nom. Knight v. Alsop*, No. 76-1051 (8th Cir., May 17, 1976) (ordering convention of statutory three-judge court). Until the question is settled, however, this Court should not permit the Union or the Board to argue from the unarticulated major premise that exclusive representation in the public sector is constitutionally invulnerable—at least if such an argument is intended to weaken the presumption against the validity of the agency-shop scheme.

b. The agency-shop scheme serves the Union's special interest at the Teachers' detriment.

Neither can the Union derive any aid or comfort from its rôle in the PERA collective-bargaining process. The Union's position in this case would arguably be strengthened if, in collective bargaining, it performed the functions of a *public agency*, or if its officers were *public officials*. For under such circumstances, this Court would scan the constellation of special constitutional principles applicable to such public organizations as the integrated bar, to chart the proper course of decision. Such a situation does not obtain here, however. Rather, the contrary is true.

Although the Union's members, and perhaps its chief officers, are public *employees*, they are not by virtue of that status also public *officials*. The distinction between public employment and public office, after all, is fundamental. Public employment involves no more than the fulfillment of *contractual* duties of a public nature—whereas, in addition to the essential characteristics of tenure, duration, emolument, and duties fixed by law, public office involves *an exercise of some part of the sovereign power of the state*. And that exercise, by hypothesis, must be undertaken *for the benefit of the public*, not merely of the office-holder. *E.g.*, *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 519-20 (1926); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); *Yaselli v. Goff*, 12 F.2d 396, 403-04 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); *Chapman v. Gerard*, 341 F. Supp. 1170, 1173-74 (D.V.I. 1970), *aff'd*, 456 F.2d 577 (3d Cir. 1972); *Cain v. United States*, 73 F. Supp. 1019, 1021 (N.D. Ill. 1947); *Wetzel v. McNutt*, 4 F. Supp. 233, 234 (S.D. Ind. 1933); *Meiland v. Cody*, 359 Mich. 78, 87, 101 N.W.2d 336, 341 (1960); *Schobert v. Inter-County Drainage Board*, 342 Mich. 270, 281, 69 N.W.2d 814, 820 (1955); *Heiliger v. City of Sheldon*, 236 Iowa 146, 154-55, 18 N.W.2d 182, 187 (1945); *Martin v. Smith*, 239 Wis. 314, 330, 332-33, 1 N.W.2d 163,

169, 171-72 (1941); *In re Olson*, 211 Minn. 114, 117, 300 N.W. 398, 400 (1941); *State v. Lofthus*, 45 N.D. 357, 362, 177 N.W. 755, 757 (1920).

The Union's role in collective bargaining is neither structured in theory, nor operates in practice, to achieve the public interest. To the contrary. In the absence of collective bargaining, terms and conditions of public employment arise through the fluid "give and take" of the political process, in which public employees may participate (at least as voters) on an equal basis with all other citizens. And, as matters of absolute legislative discretion in the final analysis, such terms and conditions as the state chooses to establish are conclusively in the public interest. *For the public interest is precisely what emerges from the proper functioning of our system of limited, representative government.* The underlying assumptions of public-sector collective bargaining, *per contra*, are: (i) that, irrespective of their coincidence with the public interest, terms and conditions of employment set "unilaterally" by public officials are somehow "unfavorable" to public employees; and (ii) that therefore these officials should be required to negotiate *other* terms and conditions with public-employee unions exercising an extraordinary measure of political "bargaining power" through such devices as exclusive representation, the agency-shop, compulsory arbitration, and the strike-threat. *See supra* pp. 62-80. Animated by these assumptions, collective bargaining in Michigan (as elsewhere) extends to the Union a special increment of political power which permits it to influence, control, or even override the normal political process. *E.g.*, Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974); *see Winston-Salem/Forsyth County Unit, Educators Association v. Phillips*, 381 F.Supp. 644 (M.D.N.C. 1974). Since the unimpeded political process is the unique source of the public interest, it follows apodictically that collective bargaining must serve some interest distinct from that of the public—to wit, the special interest of the Union.

Consideration of the *adversary* nature of collective bargaining leads to the same conclusion. The essential premise of collective bargaining is that the parties, union and employer, are separated by differences in outlook, motivation, goals, and values that cannot be resolved except through a formal process of negotiation separated from and made superior to the normal political process. *See, e.g.*, Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 25 (1972). One of these parties, however, is the representative and mandatary of *society*. Therefore, if collective bargaining in Michigan (as elsewhere) establishes an adversarial system in which representatives of the public interest appear on one side, the interest represented on the other side must be distinct from the public interest—to wit, the special interest of the Union.

We put forward these observations, not because the wisdom or constitutionality of compulsory public-sector collective bargaining is directly in issue here, but because properly to address the constitutional questions raised by this appeal the Court must carefully focus on the essential nature of the agency-shop scheme as an integral part of a process which operates *in the special interest of the Union and at the particular expense of the Teachers*. That the Union stands peculiarly to gain in several important respects from the agency-shop scheme requires little elaboration. On its face, the scheme strengthens the Union by increasing its financial resources and by coercing public employees to retain formal membership. The first is obvious enough to require no further discussion; but the second deserves particular emphasis.

American labor law makes a verbal distinction between the "union-shop" under which an employee must *join* a union as a condition of employment, and the "agency-shop", under which he need not join, in a technical sense, but must pay the union "fees" which typically (as here) equal the "dues" paid by members. The equality of fees and dues means that, in

effect, an agency-shop is merely a union-shop by another name or, as this Court has said, its "practical equivalent". *Retail Clerks, Local 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963); *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). But if the agency-shop is the practical equivalent of the union-shop, why has this dual terminology developed? The answer is quite simple. The union-shop is illegal in jurisdictions with so-called "right-to-work" laws. See *Schermerhorn*, 373 U.S. at 750-51. Therefore, unions devised the agency-shop in an attempt by subterfuge to render "right-to-work" laws ineffective. C. Morris, *The Developing Labor Law* 707 (1971).

The unions did not succeed, however, in the private sector. Twelve states have enacted "right-to-work" laws which specifically prohibit the payment to a union of dues, fees, or other charges as a condition of private employment. *Ficek v. Boilermakers, Local 647*, 219 N.W.2d 860, 865 (N.D. 1974). The "right-to-work" laws of seven other states prohibit conditioning employment on membership in a labor organization, but do not explicitly ban the payment of dues and fees as such a condition. Nevertheless, in each of these seven states the courts or attorneys general have declared the agency-shop to be the equivalent of the union-shop and therefore illegal under the "right-to-work" law. *Arizona Flame Restaurant, Inc. v. Baldwin*, 34 L.R.R.M. 2707, 2709 (Ariz. Super. Ct. 1954), *aff'd as modified on other grounds*, 82 Ariz. 385, 313 P.2d 759 (1957); Op. Ariz. Att'y Gen. No. 62-2, 49 L.R.R.M. 107 (1961); *Schermerhorn v. Local 1625, Retail Clerks*, 141 So.2d 269, 276 (Fla. 1962), *aff'd*, 373 U.S. 746, *on rehearing*, 375 U.S. 96 (1963); *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11, 23, 360 P.2d 456, 465, *cert. denied*, 368 U.S. 829 (1961); *Street Electric Railway Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Lines, Inc.*, 319 F.2d 783 (9th Cir. 1963); *Guards, Local 1 v. Wackenhut Services, Inc.*, 90 Nev. 198, 204, 522 P.2d 1010, 1014 (1974); *Ficek*, 219 N.W.2d at 873; 1957-58 Op. S.D. Att'y Gen. 221 (Jul. 8, 1958); 1961 Op. Tex. Att'y Gen. WW-1018

(Mar. 14, 1961); see *Oil Workers International Union v. Mobil Oil Corp.*, 44 U.S.L.W. 4842, 4843 n.4 (U.S. Jun. 14, 1976).

The agency-shop has also met short shrift in the public sector under statutes which guarantee public employees a right to refrain from joining or supporting labor unions. For the most pertinent example, the Michigan PERA §10 originally provided no authorization for the agency-shop, but did say (as it still does) that:

[i]t shall be unlawful for a public employer or an officer or agent of a public employer * * * to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization * * *.

Mich. Stat. Ann. §17.455(10) (1975 rev.) (emphasis supplied). In *Smigel v. Southgate Community School District*, 388 Mich. 531, 202 N.W.2d 305 (1972), the Michigan Supreme Court held that an agency-shop agreement with fees equal to union membership dues and assessments was illegal under this section as an encouragement to union membership.²³ Chief Justice Kavanagh, noted in his opinion that, under PERA §10 as then written,

an employer must assume a posture of complete neutrality regarding union membership. He must do nothing to * * * advance * * * union organizing. * * * [H]e [must] refrain from practices which * * * encourage * * * membership in labor organizations.

* * * * *

We hold that any such clause as this which makes no effort to relate the non-members' economic obligations to actual collective bargaining expenses is clearly

²³The amendment to PERA §10 in issue here was the Michigan Legislature's response to the *Smigel* decision (R., Defendants' Reply Brief, In Support of Motion of Defendants for Summary Judgment In Their Behalf, On Remand, Mich. Cir. Ct., Aug. 24, 1973, at 3-5).

prohibited * * * as of necessity * * * encouraging * * * membership in a labor organization.

388 Mich. at 539, 543, 202 N.W.2d at 306, 308 (emphasis supplied).

The New York Civil Service Law, similarly, provides that

[p]ublic employees shall have the right * * * to refrain from forming, joining, or participating in, any employee organization * * *.

N.Y. Civ. Serv. Law §202 (McKinney 1973). In *Farrigan v. Helsby*, 68 Misc. 2d 952, 327 N.Y.S.2d 909 (Sup. Ct. 1971), *aff'd*, 42 App. Div. 2d 265, 346 N.Y.S.2d 39 (1973), an agency-shop arrangement was held to violate this provision. As the appellate court emphasized,

any forced payment of dues or their equivalent would be in violation of [§202] as constituting, at the very least, participation in an employee organization.

42 App. Div. 2d at 267, 346 N.Y.S.2d at 41 (emphasis supplied).

The New Jersey public-employment act also guarantees to public employees the right not "to form, join and assist any employee organization" if they so choose. N.J. Stat. Ann. §34:13A-5.3 (1974 Cum.Supp.). In *New Jersey Turnpike Employees' Local 194 v. New Jersey Turnpike Authority*, 117 N.J. Super. 349, 284 A.2d 566 (Ch. 1971), *aff'd*, 123 N.J. Super. 461, 303 A.2d 599 (App. Div. 1973), *aff'd*, 64 N.J. 579, 319 A.2d 224 (1974), the union argued, unsuccessfully, that the act did not prohibit an agency-shop arrangement because the latter did not constitute a form of assistance to a labor organization. The reasoning of the Appellate Division is particularly pertinent here:

The agency-shop arrangement * * * mandates that payments to the union by nonmember employees are a condition of employment; the amount of such payments is the exact equivalent of initiation fees and regular dues * * *. These clauses, though counterpoised with those which purport to relate such payments to union

expenses [for collective bargaining] would have the predominant effect of inducing, if not compelling, union membership, participation and assistance on the part of nonmember employees.

123 N.J. Super at 470, 303 A.2d at 604 (emphasis supplied).²⁴

Thus, court after court, in both the private and the public sectors, has held that agency-shop arrangements such as that involved here of necessity encourage union membership. After all, it is easy enough to see that an employee who must pay the equivalent of full union dues, but by virtue of his nonmembership has no voice in internal union politics, is stripped of any opportunity to influence the course of his own employment destiny so long as the union remains his exclusive representative (see A. 11, 27-28, 48). And it is easy enough to see, therefore, that a primary purpose of the PERA agency-shop authorization is to coerce independent teachers into affiliation with the Union.

Enlarged membership, of course, permits the Union to compel a greater degree of conformity among, and of joint action from, teachers—thereby enhancing its ability to engage in campaigns of partisan political activism by contributing the services of its members, or to employ strike-threat tactics as adjuncts to collective bargaining. And that the agency-shop coerces full membership-dues without requiring employees to join the Union, and without requiring the Union to accept all employees as members, secures an added advantage. Some nonunion employees, such as the Teachers here, would not make appropriately docile and conformist union members, passively accepting whatever their leaders told them, or donating whatever personal services their leaders asked of them. For the Union, then, their continued nonmembership is

²⁴The reasoning of the Appellate Division was adopted by the New Jersey Supreme Court in its brief opinion affirming. 64 N.J. at 581, 319 A.2d at 225.

quite desirable—provided that they are coerced into “financial-core” membership. For, in the final analysis, a continuously funded treasury is the *sine qua non* of the Union’s existence, money being the necessary lubricant for the wheels of political power. As one recent and exhaustive study of the political nature of public-sector unionism reported,

[o]nce it has been designated the exclusive bargaining representative, a high priority among a union’s bargaining goals is the establishment of various types of union security devices designed to ensure the union’s continued strength. *** A[n] increasingly common device is the agency shop, in which all members of the bargaining unit are required to pay the union a fee ***, whether or not they are members of the union. *** [This device] increases the financial strength of the union, which in turn increases its ability to make political contributions and to carry on effective political action programs.

*The cumulative effect of exclusive recognition [and] union security devices *** will be to produce employee organizations which possess great potential political power. *** [T]he campaign contributions and the cadre of willing political volunteers which large unions are able to provide *** can make active union support extremely valuable, since *** political campaigns are expensive undertakings. *** [E]lected officials and their appointees may too readily accede to the demands of powerful unions in an effort to garner future political support, or at least to avoid active union opposition. By the same token, there is doubt that an elected official who has received considerable support from an employee union could subsequently be objective in dealing with matters of concern to that union.*

Project, “Collective Bargaining and Politics in Public Employment” (pt. 4), 19 *U.C.L.A.L. Rev.* 887, 1010, 1035-37, 1039 (1972) (footnotes omitted) (emphasis supplied). As this study shows, then, the special privilege provided by the PERA agency-shop authorization is a benefit of singular importance to the Union.

That the Teachers stand particularly to suffer from the agency-shop is also self-evident. As we have shown, compelled financial support of the Union’s activities strips them of their freedom of self-determination where speech, association, and petition are concerned. But even more importantly, it makes them unwilling purveyors of high-octane fuel to an engine of political activism on a direct collision course with the public interest. *See infra* pp. 147-86.

In sum, the PERA agency-shop scheme enlists the power of the state to “redistribute” financial resources from the Teachers to the Union’s private purposes. This would be a serious enough affront to our Constitution even if the Union’s activities were innocuous in their effect on the public interest. For no idea is more basic to our system than that government has no power to seize the property of some individuals in order to aid the private endeavors of others. *E.g.*, *Citizens’ Savings & Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655, 663-64 (1875); *Cole v. City of La Grange*, 113 U.S. 1, 6 (1885); *United States v. Butler*, 297 U.S. 1, 61 (1936); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937). But the affront is exacerbated where, as here, the resources are “redistributed” from innocent public employees to an arm of a militant socio-political movement committed to wresting from the public whatever emoluments, special privileges, and extraordinary influence those monies can purchase from eager sellers in the political marketplace.

Indeed, it constitutes a singularly complex and critical violation, not only of the First and Fourteenth Amendments, *but even of the Constitution taken as a whole*. For the very legitimacy of our entire republican system rests upon the presumption that government will employ its legislative powers to provide and maintain a just framework within which all of the politically diverse elements in our society may compete, fairly and equally, for influence *not* to serve as a “collection agency” with the assistance of which

particular organized groups may ~~advance~~ at the expense of individuals to become the ~~unwanted~~, unappointed, and unrepresentative, but nevertheless unremovable, arbiters of public policy. Compare, e.g., *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring), with *Coppage v. Kansas*, 236 U.S. 1, 16-17 (1915). See *infra* pp. 164-76. The First Amendment is a particularly eloquent statement of this commitment to political equality in speech, association, or petition—a statement of the profound and permanent public interest in autonomy of thought, expression, and action where our most precious political freedoms are concerned. Cf., e.g., *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion), cited in *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719-20 (1931). The existence of that public interest is incompatible with any requirement that individual public employees such as the Teachers sacrifice their self-determination in political affairs for the benefit of any private association. The agency-shop scheme is such a requirement. Therefore, it is unconstitutional *per se*.

Because, as we have shown, the agency shop is unconstitutional *per se*, there is no compelling need to discuss the merits of any possible justifications for it. Nonetheless, in Part II.B., *infra* p. 115, we shall consider to what extent the Michigan Legislature and the Court of Appeals have put forward valid state interests in support of the scheme. Before we do, however, we wish to emphasize the highly specific nature of the constitutional conclusion which we have already drawn.

Our argument is based on the simple syllogism that: (i) For the state to require the Teachers as a condition of their employment to finance the Union's political and ideological activism infringes their freedoms under the First and Fourteenth Amendments. (ii) With respect to issues of First-

and Fourteenth-Amendment autonomy, there is no difference between requiring the Teachers financially to support the Union and requiring them financially to support any other private organization. (iii) Therefore, the agency-shop requirement is unconstitutional on its face under the doctrine this Court enunciated in such cases as *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 379-80 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 288 (1961); and *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960). We have, of course, also pointed to a set of decisions of the inferior federal courts which unanimously extend the reasoning of the *Pickering* line of cases to hold that a state cannot condition public employment upon nonassociation with a labor union. And we have argued that, if these decisions are correct, then our position is constitutionally sound *a fortiori*. *Supra* pp. 34-40. But, while we take comfort in the added authority which the inferior federal courts bring in support of our claim, we need not and do not rely exclusively on the law of those cases as it is colored by their peculiar factual assumptions. In the final analysis, our argument depends only upon the general principles this Court established in such cases as *Pickering*, as applied to the record in this case.

We emphasize this because the decisions of the inferior federal courts extending the *Pickering* unconstitutional-conditions doctrine to protect union-membership in the public sector are premised on an assumption not yet definitively endorsed by this Court: namely, that for constitutional purposes there is no difference between a union and any other private association where government conditions employment on nonmembership. We do not believe that this can be an "absolute" of constitutional law. For we cannot imagine that a court true to its duty to protect our constitutional system could construe the First Amendment so as "absolutely" to protect public employees in forming and

joining unions even when their actions were incompatible with the continued good order and proper functioning of government. In the recent Hatch-Act cases, this Court held that the First Amendment does not guarantee federal or state employees any privilege to engage in partisan political activities inherently subversive of the ability of government to carry out its constitutional duties. *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 557, 564-66 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-18 (1973). The same could be said of the privilege to join and support a union inextricably involved in political and ideological activism. In light of the peculiarly political nature of public-sector unions, and the special responsibilities of government to insulate its employees from all political pressures antagonistic to the impartial and efficient administration of public services, denial of that privilege would certainly have a rational basis. See *Letter Carriers*, 413 U.S. at 564.

For this reason, we wish carefully to distinguish our position from one which overbroadly assimilates public-sector unions to other private associations. Contrary to the view of the inferior federal courts, we contend that public-sector unions are distinguishable from all other private associations on at least one crucial ground: namely, their participation in the inherently and immutably political collective-bargaining process. It is this participation, enhanced by their notorious political and ideological activism of both a partisan and non-partisan nature, which requires that they be classified as a species of political association *sui generis*. See *supra* pp. 62-80.

Therefore, even if this Court were in some future case to reject the assumptions of the inferior federal courts and their application of the *Pickering* doctrine to public-sector unionism, it could do so consistently with a decision for the Teachers here. Holding that a state may not constitutionally condition public employment upon membership in or

financial support of a labor organization, because the participation of a union in public-sector collective bargaining renders it an inherently political association, could in no way logically preclude this Court from holding that a state may condition public employment upon nonmembership in a labor organization because the partisan political activism of contemporary unions threatens seriously to undermine the stability of government. For the two statements are equally necessary implications of the same proposition: namely, that the First and Fourteenth Amendments do not guarantee public employees, as individuals or in an association, any "right" to engage in—and certainly not with the cooperation of a state agency to compel dissenters to engage in—political activity which is inimical either to the dissenters' freedom of self-determination or to the continued existence of good order and proper functioning in government. See *supra* pp. 21-80, and *infra* pp. 164-86.

B.

Neither the appellees, nor the Michigan Legislature, nor the Court of Appeals has put forward either a substantial or even a legitimate state interest in support of the agency-shop scheme.

We have already demonstrated that this case raises an issue of First- and Fourteenth-Amendment freedom which precludes application of the "balancing test", and that consideration of the character and essential effect of the PERA agency-shop scheme leads inexorably to the conclusion that it is unconstitutional *per se*. See *supra* pp. 83-99. In this subpart we shall show that, even if the "balancing test" were applicable here, the same constitutional result would obtain.

We may concede for purposes of brevity in argument that the State of Michigan possesses inherent power to regulate the public-employment relationship, and even that the exercise of this power should be accorded broad deference by the courts.

Nevertheless, this Court is not bound to accept the phrase "police power" as a talisman, immunizing from constitutional scrutiny any regulation which the active imaginations of artful advocates can bring within its ambit. E.g., *Panhandle Eastern Pipe Line Co. v. Highway Commission*, 294 U.S. 613, 619 (1935); *New Orleans Gas-Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 661 (1885); see *United States v. Robel*, 389 U.S. 258, 263-64 (1967). Nor need we stand in awe of claims that the agency-shop is an essential element of an overriding "public policy" in Michigan. For, at best, the theory of "public policy" embodies a doctrine of vague and variable quality, subordinate, not superior, to constitutional limitations. *Patton v. United States*, 281 U.S. 276, 306 (1930). Since the PERA agency-shop scheme significantly infringes fundamental First- and Fourteenth-Amendment freedoms, mere assertions that the infringement is rationally related to the achievement of some hypothetical government purpose are not enough.

In Part II.B.1., *infra* p. 117, we shall establish that the appellees have failed to carry the burden of proof necessary to justify the PERA agency-shop scheme. In Part II.B.2., *infra* p. 120, we shall show that neither the Michigan Legislature nor the Court of Appeals has carried this burden, either—and that, indeed, the Court of Appeals has specifically held that the requirement of proof cannot be satisfied. And in Part II.B.3., *infra* p. 128, we shall consider extrinsic evidence bearing on the insubstantiality of Michigan's purported interest in the agency-shop. Later, in Part II.C., *infra* p. 147, we shall demonstrate that, rather than serving substantial and important governmental goals, the scheme actually works to frustrate three of the state's most compelling duties.

I.

Those supporting the agency-shop scheme have the burden of disproving its repugnance to the First and Fourteenth Amendments with clear and convincing evidence.

In some contexts, state regulation of individuals' liberties is constitutional under the Due Process Clause of the Fourteenth Amendment if it satisfies the *de minimis* "rational-basis test" alone. But the test of legislation which collides with the Fourteenth Amendment because it also affronts the principles of the First is much more rigorous and specific. For the character of First-Amendment freedoms, and their priority in our constitutional system, gives them a sanctity and a sanction not permitting dubious intrusions. Rather, since these freedoms form the very foundations of our democratic institutions, the presumption is strongly against any legislative interference with their exercise—and especially one which operates as a prior restraint. *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945); *United States v. CIO*, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne County*, 393 U.S. 175, 181 (1968); *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 463 (1958).

The appellees can rebut this presumption of unconstitutionality only by demonstrating that the PERA agency-shop serves a compelling government interest by the means least restrictive of the exercise of protected liberty. This requires that they show three things: First, that the scheme has a

substantial rational relation to some definitely specified, legitimate, and important state goal. No showing merely of a "rational basis" will suffice. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gibson*, 372 U.S. at 546, 550-51; *NAACP v. Button*, 371 U.S. 415, 439-44 (1963); *Bates*, 361 U.S. at 525-27.

Secondly, they must demonstrate the "overriding" and "compelling" nature of the public interest they claim the scheme serves. While this Court has variously articulated the quality of the governmental interest necessary to justify infringements on First- and Fourteenth-Amendment freedoms, all its decisions have recognized that the regulated conduct or actions invariably posed some substantial threat to public safety, peace, or order—and that this threat was neither doubtful nor remote, but rather likely and imminent. Such a showing is the minimum demand of the Bill of Rights. *Gibson* 372 U.S. at 546; *Sherbert*, 374 U.S. at 403; *Thomas*, 323 U.S. at 530; *Bridges v. California*, 314 U.S. 252, 263 (1941).

Finally, the appellees must prove that the agency-shop scheme is necessary to achieve the compelling interest they have identified—in the sense that the law specifically bars only the conduct deemed obnoxious and is carefully drawn and narrowly aimed at that forbidden conduct alone. Even though a state government may have a purpose both legitimate and substantial in some regulation which infringes protected liberty, it may not constitutionally pursue its purpose by means that broadly stifle the exercise of basic freedoms if it can achieve the same end with less drastic means. In the area of fundamental First- and Fourteenth-Amendment liberties, governmental regulations must be highly selective, constitute sensitive tools, and operate only with narrow specificity and precision. *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring); *Shelton v. Tucker*, 364 U.S.

479, 485-90 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Button*, 371 U.S. at 433, 438; *Talley v. California*, 362 U.S. 60, 64, 66-67 (1960) (opinion of the Court; Harlan, J., concurring); *Schneider v. Town of Irvington*, 308 U.S. 147, 162-64 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938); see *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *United States v. Robel*, 389 U.S. 258, 264-68 & n.20 (1967).

Moreover, since First-Amendment liberties are involved, the appellees cannot prevail on a mere preponderance of the evidence, but must bring forward clear and convincing proof. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-52 (1971) (opinion of Brennan, J.).

The record in this case is devoid of any such proof. Indeed, the Michigan courts did not even deign to require the Board or the Union to bring forward *any* factual matter, let alone a preponderance of the evidence or clear and convincing proof. Rather, the trial court dismissed the Teachers' complaints for failure to state a claim on which relief could be granted (A. 75-77)—in the teeth of both the presumption of unconstitutionality established in this Court's decisions, and the Michigan rule that on a motion to dismiss all factual allegations in the complaint are assumed to be true and viewed in the light most favorable to the plaintiffs. *E.g., Crowther v. Ross Chemical & Manufacturing Co.*, 42 Mich. App. 426, 429-31, 202 N.W.2d 577, 580 (1972). And the Court of Appeals affirmed—passing over not only the rules of pleading ignored by the trial court, but also the full implications of its own judicial notice of the partisan political activities of public-sector unions (A. 101), in its haste to dispose of this case on the groundless theory that the Teachers lacked "standing" to challenge the agency-shop scheme. See Part IV., *infra* p. 199. Moreover, while liberating appellees of any requirement to demonstrate that the scheme serves a compelling state interest in the manner least restrictive of free speech, association, and

petition, the Michigan courts denied the Teachers all opportunity either to challenge the courts' inarticulated and constitutionally impermissible assumption that it does, or even to introduce their own evidence disproving its rational basis, although that is their right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 204, 209-13 (1934).

The absence of these proofs decisively demonstrates that, even under the "balancing test", the agency-shop is unconstitutional on its face—because the interests it purportedly serves are not and cannot be classed as "compelling", and because it has already been adjudicated *not* to be the means least-restrictive of First- and Fourteenth-Amendment liberty to achieve the interests it does serve. To these considerations we now turn.

2.

Rather than constituting disproof of the unconstitutionality of the agency-shop scheme, the statements of the Michigan Legislature and the Court of Appeals establish its repugnance to the First and Fourteenth Amendments.

In the absence of a factual record, we must look elsewhere for some indication of what legitimate and substantial governmental interest the PERA agency-shop scheme might possibly serve. We cannot, however, permit our gaze to stray hither and yon even into the wild thicket of speculations which might be appropriate ground if this case were ruled by the "rational-basis" test. Rather, we must confine ourselves to the governmental purpose which the state has articulated and upon which it explicitly relies for justification of the agency-shop. E.g., *Bates v. City of Little Rock*, 361 U.S. 516, 525

(1960); *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). That purpose appears in PERA §10(2), as follows:

(2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that *the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.*

Mich. Stat. Ann. §17.455(10)(2) (1975 rev.) (emphasis supplied).

We take as fully established that a declaration of this kind, setting forth a conclusion of constitutional law as to what constitutes the public interest, welfare, or necessity, is not binding on this Court. And we take as equally established the inconclusiveness of such a declaration in a case where, as here, serious infringements on fundamental constitutional liberties are in issue. E.g., *Block v. Hirsh*, 256 U.S. 135, 154 (1921); *Tyson & Brother v. Banton*, 273 U.S. 418, 431 (1927); *Everson v. Board of Education*, 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting); *United States v. United States Steel Corp.*, 251 U.S. 417, 463 (1920) (Day, J., dissenting). But if, as a conclusion of law, the statement of §10(2) is without force, as a purported "finding" of fact it is without reason. Indeed, it is not a true "finding" at all, but a mere baseless conjecture as to the general effect of the agency-shop scheme upon the promotion of stability in public-sector labor relations. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935).

We should tax this Court's indulgence to no compelling purpose if we quoted at length from the tables of public-sector strikes, work-stoppages, and man-days lost prepared over the years by the United States Department of Labor. It

is enough to refer to the report "Work Stoppages in Government, 1974", prepared by the Bureau of Labor Statistics' Division of Industrial Relations, and reported in *GERR* Ref. File 71:1011 (Jun. 14, 1976). See Table I (facing page). For those who care to study them, these figures set out with mathematical clarity an empiric rebuttal of the notion that increased union activity in the public sector is a "stabilizing" influence on the administration of public services. They are, however, supererogatory. For the error inherent in the declaration of the Michigan Legislature is not one of complicated sums, percentages, or other statistics—but one of quite fundamental and simple logic. There can be no rational basis for the statement that "the stability and effectiveness of labor relations in the public sector require [the agency-shop]", because there is no rational basis for the implicit premise that the financial strength of public-employee unions is a factor which contributes to such stability.

We have already noted that collective bargaining in the public sector is designed to permit unions to influence, control, or override policy-judgments of public officials made through the normal political process. *Supra* pp. 103-05. Collective bargaining therefore presupposes that public-employee unions (or at least their leaders) frequently will be in disagreement with the representatives of society as to what terms and conditions of employment should be established in the public service. This, of course, is not accidental—considering that the collective-bargaining process is merely the embodiment in statute form of the philosophy of trade unionism, and that the philosophy of trade unionism posits the existence of a permanent struggle between employers and organized employees in which the central rôle of unions is to compel employers to grant ever-increasing economic concessions to their employees. Cf., e.g., *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944); S. Perlman, *A Theory of the Labor Movement* (1928). But it does necessarily imply that *collective bargaining is a*

Table 1. Work stoppages by level of government, 1942-74
(Workers involved and days idle in thousands)

| Year | Total ¹ | | | Federal Government | | | State government | | | Local government | | |
|------|---------------------|------------------|-----------------------|---------------------|------------------|-----------------------|---------------------|------------------|-----------------------|---------------------|------------------|-----------------------|
| | Number of stoppages | Workers involved | Days idle during year | Number of stoppages | Workers involved | Days idle during year | Number of stoppages | Workers involved | Days idle during year | Number of stoppages | Workers involved | Days idle during year |
| 1942 | | | | | | | | | | | | |
| 1943 | | | | | | | | | | | | |
| 1944 | | | | | | | | | | | | |
| 1945 | | | | | | | | | | | | |
| 1946 | | | | | | | | | | | | |
| 1947 | | | | | | | | | | | | |
| 1948 | | | | | | | | | | | | |
| 1949 | | | | | | | | | | | | |
| 1950 | | | | | | | | | | | | |
| 1951 | | | | | | | | | | | | |
| 1952 | | | | | | | | | | | | |
| 1953 | | | | | | | | | | | | |
| 1954 | | | | | | | | | | | | |
| 1955 | | | | | | | | | | | | |
| 1956 | | | | | | | | | | | | |
| 1957 | | | | | | | | | | | | |
| 1958 | 15 | 1.7 | 7.5 | | | | | | | | | |
| 1959 | 25 | 2.0 | 10.5 | | | | | | | | | |
| 1960 | | | | | | | | | | | | |
| 1961 | 36 | 28.6 | 58.4 | | | | | | | | | |
| 1962 | 28 | 6.4 | 15.3 | | | | | | | | | |
| 1963 | 29 | 31.1 | 79.1 | 5 | 4.4 | 31.8 | 2 | 1.7 | 2.3 | 23 | 25.3 | 43.1 |
| 1964 | 41 | 4.8 | 15.4 | | | | 4 | .3 | 3.2 | 27 | 4.6 | 8.7 |
| 1965 | 42 | 22.7 | 70.8 | | | | | | | 37 | 22.5 | 57.7 |
| 1966 | 142 | 11.9 | 146.0 | | | | | | | 42 | 11.9 | 145.0 |
| 1967 | 181 | 105.0 | 455.0 | | | | | | | 133 | 102.0 | 449.0 |
| 1968 | 254 | 132.0 | 1,250.0 | | | | 12 | 4.7 | 16.3 | 169 | 127.0 | 1,230.0 |
| 1969 | 411 | 201.8 | 2,545.2 | 3 | 1.7 | 9.6 | 18 | 9.3 | 42.8 | 235 | 190.9 | 2,492.8 |
| | | | | 2 | .6 | 1.1 | 37 | 20.5 | 152.4 | 372 | 139.0 | 592.2 |
| 1970 | 412 | 333.5 | 2,023.2 | | | | | | | | | |
| 1971 | 329 | 152.6 | 801.4 | 3 | 155.8 | 648.3 | 23 | 8.8 | 44.6 | 386 | 168.9 | 1,330.5 |
| 1972 | 375 | 142.1 | 1,257.3 | 2 | 1.0 | 8.1 | 23 | 14.5 | 81.8 | 304 | 137.1 | 811.6 |
| 1973 | 387 | 196.4 | 2,303.9 | | | | 40 | 22.4 | 231.7 | 335 | 114.7 | 983.5 |
| 1974 | 384 | 160.7 | 1,404.2 | 2 | .5 | 4.6 | 29 | 12.3 | 133.0 | 357 | 183.7 | 2,166.3 |
| | | | | | | | 34 | 24.7 | 86.4 | 348 | 135.4 | 1,316.3 |

¹ The Bureau of Labor Statistics has published data on strikes in government in its annual reports since 1942. Before that year, they had been included in a miscellaneous category—other nonmanufacturing industries. From 1942 through 1957, data refer only to strikes in administrative, protective, and sanitary services of government. Stoppages in establishments owned by government were classified in their appropriate industry; for example, public schools and libraries were included in education services, not in government. Beginning in 1958, stoppages in such establishments were included under the government classification. Stoppages in publicly owned utilities, transportation, and schools were reclassified back to 1947 but a complete reclassification was not attempted. After 1957, dashes denote zeros.

² Fewer than 100.

³ Idleness in 1965 resulted from 2 stoppages that began in 1964.

NOTE: Because of rounding, sums of individual items may not equal totals.

method for introducing and legitimating conflict in the administration of public services, and not a source of "stability and effectiveness" in labor relations.

As such, collective bargaining is fundamentally subversive of the symbiotic employer-employee relationship upon which the stability and effectiveness of public-sector labor relations depend. While public-employee unions can irresponsibly demand "more" and "still more" at the bargaining table (and, indeed, are driven to do so by the necessity of retaining their members), public employers must grapple with the economic and political problem of allocating limited resources to competing public needs. At some point, therefore, the employers must refuse to accede to the unions' demands. The process of collective bargaining thus inexorably casts the parties into antagonistic stereotypes from the perspective of public employees: the employers as close-fisted and unsympathetic masters, the unions as open-handed and concerned benefactors. And inexorably the employees tend increasingly to identify themselves with, and to attach their primary loyalties to, the unions as their protectors and protagonists. The agency-shop, of course, intensifies this tendency by effectively endorsing in law the notion that public employees owe the terms and conditions of their employment, not to the public employers who engage their services or to the taxpayers who provide their salaries, but to the unions who negotiate for them.

This Court has already recognized the perversity of such a result in its observation that each public employee owes his loyalty "directly, immediately, and entirely" to his government. "He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." *Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968). Here the Court need consider but a single further rhetorical question to conclude that the declaration of the Michigan Legislature is nonrational. Given the existence of a bargaining system premised upon economic

and political conflict between the parties; the participation in this system of private organizations the very survival, and certainly the success, of which are dependent upon conflict; the natural tendency of (and, in certain particulars, the legal necessity for) employees subordinated to these organizations through the exclusive-representation device to support them in any conflict with their employers; and the capacity of the agency-shop, not only to swell the organizations' treasuries, but also to coerce public employees into full membership—given all of these factors, could one draw any conclusion other than that Michigan has created a mechanism ill-suited for promoting labor "stability and effectiveness", but well-adapted for enhancing the likelihood and intensity of public-sector strikes, work-stoppages, and impasses? Certainly the logic of the system does not suggest that one could adduce clear and convincing proof of the contrary proposition.

On its face, then, PERA §10(2) provides no rational, let alone a substantial or compelling, basis for the agency-shop in public employment. Instead, it indicates that Michigan's commitment to the scheme promotes an obviously *illegitimate* purpose: namely, a delegation of sovereign power to private parties. *See infra* pp. 179-86. PERA §10(2) declares, we repeat, that

the stability and effectiveness of labor relations in the public sector require, *if such requirement is negotiated with the public employer*, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee *which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative*. [Emphasis supplied].

The section explicitly leaves to the Union the absolute discretion to negotiate, or not to negotiate, an agency-shop arrangement; to incur whatever expenses it deems appropriate in the collective-bargaining process; and then to "tax" these expenses, in whatever amount it desires (to a limit of

membership-dues), against the dissenting Teachers as a condition of their employment. The Michigan Legislature's "finding", therefore, amounts to the claim that the delegation to a private organization of arbitrary discretion to perform acts unlimited by any precise standards, unsupervised by any state agency, inconsistent with the maintenance of a proper employer-employee relationship, and incompatible with the Teachers' First- and Fourteenth-Amendment freedoms, is necessary to the public interest. Could anything more clearly demonstrate the absence of a compelling *public* interest than this total abdication of legislative authority to the discretion of public-sector unions? *Cf. supra* pp. 56-62.

We need not explain in detail how prior decisions of this Court foreclose the question of the unconstitutionality of such a delegation of power to private parties to structure the public interest according to their own. *E.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 318 (1936) (opinion of the Court; Hughes, C. J., concurring); and *cf. Lathrop v. Donohue*, 367 U.S. 820, 853-55, 878 n.1 (1961) (Harlan, J., concurring; Douglas, J., dissenting). Neither need we advert to the controlling nature of these decisions on the issue of exclusive representation which underlies the whole agency-shop problem. It is not our purpose to raise the constitutional conundrums which both Justices Harlan and Douglas in *Lathrop* considered pregnant with danger and difficulty even where the integrated bar, an arm of the state judiciary, is concerned. What we do urge upon this Court, though, is the realization that, in light of *Schechter* and *Carter*, the declaration of the Michigan Legislature impermissibly assumes that the kind of abdication which this Court has already declared to be a delegation of legislative power unknown to our law and an intolerable and unconstitutional interference with personal liberty, when enacted on a nationwide basis, may somehow be in the public interest in Michigan—and so much so, that it

justifies imposing political and ideological conformity upon the Teachers. Such an assumption cannot serve, in logic or law, as the basis for the agency-shop scheme.

Furthermore, even assuming *arguendo* that the Michigan Legislature had succeeded in identifying a legitimate and substantial state interest in the agency-shop, a finding of its unconstitutionality would not be foreclosed. For the Michigan Court of Appeals has already ruled that the scheme is not a means carefully tailored to achieve the purported goal of providing financial support for the Union's collective-bargaining activities, but instead permits the Union broadly to infringe the Teachers' First- and Fourteenth-Amendment liberties (A. 100-02).

We have established elsewhere that the Michigan Court's construction of the agency-shop scheme as permitting the Union to expend coerced "fees" for any purposes is definitive, and binding on this Court. *See* Jurisdictional Statement at 21 n.16. Here we need only emphasize that, having determined that the scheme abridges constitutionally guaranteed freedoms, the Court of Appeals has precluded *even the possibility* of appellees' satisfying the "least-restrictive-alternative" aspect of the "balancing test". And on that basis alone, it should have entered judgment for the Teachers. *See* Part IV., *infra* p. 199.

In sum, the declaration of the Michigan Legislature and the construction of PERA §10 by the Court of Appeals demonstrate the absence of any legitimate, let alone substantial, state interest in the agency-shop scheme. The state has no legitimate interest in compelling the Teachers, as a condition of their employment, to finance activities of a private organization which are inconsistent with the continued stability and effectiveness of public-sector labor relations. The state has no legitimate interest in delegating essentially unlimited and wholly unsupervised power to the Union to "tax" the Teachers for the privilege of serving their own government. The state has no legitimate interest in permitting the Union to

engage in wide-ranging prior restraints of the Teachers' freedoms not to speak, not to associate, and not to petition. And as we shall show in Part II.C., *infra* p. 147, the state has fundamental duties militating decisively against any scheme such as the agency-shop which promotes the latter illicit interests. Therefore, the scheme is unconstitutional on its face.

3.

The Teachers would pose no danger to the orderly and efficient provision of public services if their freedom to refuse to contribute financial support to the Union were recognized and protected.

The absence of any record evidence, legislative findings, or judicial statements in support of the PERA agency-shop scheme does not stand alone in its condemnation. Added support can be found in two other sources: (a) the pattern of labor relations generally prevailing in both the public and private sectors; and (b) the judicially mandated standards for determining whether public employees may be disciplined or discharged for speech or associational activities. Consideration of these matters establishes beyond peradventure that the Teachers would in no way threaten any interest the state has in the orderly and efficient provision of educational services to the City of Detroit if their freedom to refuse to contribute financial support to the Union were recognized and protected.

a. The vast majority of jurisdictions throughout the country consider the agency-shop so unimportant to the achievement of any compelling public interest that they disallow it altogether, or make it discretionary with the employer and union.

If the agency-shop were indeed *necessary* to achieve a compelling state interest of some sort in public-sector labor

relations, we should expect to find it the prevailing rule in most jurisdictions, as well as compulsory rather than (as in Michigan) discretionary with the public employer and union. To be sure, even if every state and the federal government had adopted the compulsory agency-shop, their actions would not foreclose the issue of its unconstitutionality; but their failure to do so would certainly speak eloquently as to the absence of an urgent public need for the scheme. For, after all, it would be callous of us to assume that legislatures throughout the nation are more out of touch with what the public interest requires than is Michigan's.

What, then, are the facts? Not congenial to the appellees' position, by any means. Less than one-third of the states—fifteen, to be exact—permit the agency- or union-shop in public employment. And of these, ten make it discretionary with the employer and union;²⁵ three make it discretionary with the union alone;²⁶ and only two make it mandatory.²⁷ More than two-thirds of the states,²⁸ and the federal govern-

²⁵ Alaska Stat. §23.40.110(b)(1-2) (1975) (union- and agency-shops); Cal. Gov't Code §3546 (West Supp. 1976) (teachers and other public-school employees); Ky. Rev. Stat. Ann. §345.050(1)(c) (Supp. 1974) (firemen) (union-shop); Mass. Gen. Laws Ann. ch. 150E, §12 (Supp. 1975); Mich. Stat. Ann. §17:455(10) (1975 rev.); Mont. Rev. Codes Ann. §59-1605(c) (Supp. 1976); Ore. Rev. Stat. §§ 243.666(1), 243.762(c) (1974); Vt. Stat. Ann. tit. 21, §§1722(a)(1), 1726(a)(8) (Supp. 1975) (union- and agency-shops); W. Va. Code Ann. §21-1A-4(a)(3) (rep. vol. 1973) (union-shop); Wis. Stat. §§111.70(1)(h), 111.70(2) (municipal employees), 111.81(6), 111.84(1)(f) (state employees) (1974).

²⁶ Hawaii Rev. Stat. §§89-3, 89-4 (Supp. 1976); Minn. Stat. Ann. §179.65, subd. 2 (Supp. 1976); Wash. Rev. Code §§28B.16.100 (teachers in higher education), 41.56.122 (public employees other than teachers) (Supp. 1975).

²⁷ Conn. Gen. Stat. Ann. §31-105(5) (1972); R.I. Gen. Laws Ann. §36-11-2 (Supp. 1975).

²⁸ See CCH Lab.L. Rep., State Laws ¶47,000 *et seq.*

ment,²⁹ make *no* provision for the agency-shop in their public-employment laws. Since a statutory authorization for the agency-shop which leaves its implementation to the caprice of the employer and union—or, worse yet, of the union *alone*—cannot as a matter of law, we submit, be said to subserve a *compelling* state interest,³⁰ we are left with but *two* states, Connecticut and Rhode Island, which have acted as logically as they should have if their legislators perceived an urgent need for the forced financial support of public-employee labor unions. Here, indeed, is a powerful case for the agency-shop—“as Maine goes, so goes Vermont”! And even if we concede *arguendo* that an agency-shop authorization left to exclusive union discretion generally amounts to a mandatory agency-shop, we amass no more than the staggering total of *five* states which demonstrate a full commitment to the concept of compulsory unionism for public servants. *Five states out of fifty*. Who, we are entitled to ask, is out of step with whom?

It is not impossible to conceive of these few states as blessed with a sensitivity to employment relations denied to the other nine-tenths of our nation and to Congress as its spokesman. But it is more realistic to attribute their eccentric actions, not to the probing insights of lawmakers, but to the political influence of lobbyists for the special-interest groups which stand particularly to gain from the agency shop: namely, public-employee unions. For, as we shall see in Part II.C.3., *infra* p. 164, the agency-shop is an instrument well and purposefully crafted to consolidate and strengthen the political position of these unions *vis-a-vis* society in general.

²⁹ See Exec. Order 11,491, 5 U.S.C.A. §7301 (Supp. 1976).

³⁰ “Compel” is defined as “To drive or urge with force, or irresistibly; to constrain; oblige; necessitate, whether by physical or moral force * * *.” *Webster's New Int'l Dictionary* 544 (2d ed. unabg. 1934). A state interest is hardly “compelling” in this sense of the term when its achievement can be left to the arbitrary and unsupervised whim of private parties.

“But”, the appellees may retort, “this argument fails to emphasize that public-sector collective bargaining in general, and the agency-shop in particular, are relatively recent phenomena—and, as such, cannot be judged by merely counting the noses of their advocates.” Very well then: let us consider two other points. First, history. Organized government has existed in this country since the early 1600's. Yet for over three hundred years, no one has considered the agency-shop necessary, desirable, or *even permissible* in the public service. Indeed, prior to the 1950's, public-employee unions themselves were generally banned as incompatible with the public interest in undivided loyalties among government workers. *E.g., Perez v. Board of Police Commissioners*, 78 Cal. App. 2d 638, 650-51, 178 P.2d 537, 545 (1947). And during this period, government seemed to function adequately—without, it should be noted in passing, constant interruptions by union strike-threat pressure financed in part with coerced agency-shop payments. *See infra* pp. 176-86.

A second point we might consider is that of policy. Even in the private sector, where unionism and collective bargaining have always been tolerated and (for the past fifty years) protected and fostered by statute, the law has never imposed the agency-shop or any other form of compulsory unionism. Both the Railway Labor and the National Labor Relations Acts *permit*, but do *not* require, employers and unions to negotiate agency-shop arrangements.³¹ And the National Labor Relations Act specifically recognizes the continuing power of the individual states to ban all forms of compulsory unionism within their jurisdictions.³²

³¹ Railway Labor Act §2, Eleventh, 45 U.S.C. §152, Eleventh (1970); National Labor Relations Act §8(a)(3), 29 U.S.C. §158(a)(3) (1970).

³² National Labor Relations Act §14(b), 29 U.S.C. §164(b) (1970). These state “right-to-work” laws proscribing the agency-shop are catalogued *supra* pp. 106-07. The Railway Labor Act pre-empts “right-to-work” laws. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 231-32 (1956). *See* Part III., *infra* p. 191.

In short, the labor-relations laws of the public and private sectors refute any notion that the PERA agency-shop scheme serves a compelling public need.

b. Assertion of their First- and Fourteenth-Amendment freedoms through refusal to support the Union by the payment of agency-shop fees is not a legitimate basis for dismissal or discipline of the Teachers.

In *Pickering v. Board of Education*, this Court established the principle that public-school officials could not constitutionally dismiss a teacher from employment for the exercise of First- and Fourteenth-Amendment freedoms unless that exercise were shown, or could be presumed, either to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 391 U.S. 563, 572-73 (1968) (footnote omitted). This holding was presaged and followed by numerous decisions of the inferior federal courts, a representative selection of which includes the following:

[W]here the effect [of a state policy] is to impose, without some concern for qualifications to teach, the heavy burden of unemployment solely upon those whose constitutional rights were violated, * * * the application of the policy (although that policy is nondiscriminatory on its face and is based upon otherwise rational considerations) becomes impermissible.

Smith v. Board of Education, 365 F.2d 770, 780 (8th Cir. 1966) (Blackmun, J.).

Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers.

James v. Board of Education, 461 F.2d 566, 571 (2d Cir.), cert. denied, 409 U.S. 1042 (1972).

When a government employee asserts that his rights have been unconstitutionally infringed, it is necessary to strike a balance between the interests of the employee as a citizen and the interests of the government in promoting the efficiency of the services it performs through its employees. In striking that balance in the context of the First Amendment guarantee of freedom of speech, * * * the standard of material and substantial interference is the standard to apply.

Smith v. United States, 502 F.2d 512, 516-17 (5th Cir. 1974).

Even if the exercise of a right protected by the first amendment were only one of several reasons for dismissal, the dismissal would be unlawful.

Hostrop v. Board of Junior College District No. 515, 523 F.2d 569, 573 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3622 (U.S. May 4, 1976).

In the instant case, there was no suggestion that [the teacher's] behavior resulted in any disruption of school activities, or that her behavior interfered with or denied the rights of the other teachers or students.

Hanover v. Northrup, 325 F.Supp. 170, 173 (D. Conn. 1970).

The school had no power to curtail [the teacher's] freedom of association, but did have the right not to rehire him at a point where the exercise of his constitutional privileges overbalanced and outweighed his usefulness as an instructor.

Jennings v. Meridian Municipal Separate School District, 337 F.Supp. 567, 571 n.2 (S.D. Miss. 1970), aff'd, 453 F.2d 413 (5th Cir. 1971).

[T]he state has failed to show any *actual interference* by [the teacher's] conduct with any interest of the state in its educational endeavors. Not as much as a single student or teacher or administrator—or even towns-person—came forward with any evidence that [the teacher's] associations had affected any relationship she had with any student, any teacher, or any administrator. Her effectiveness as a teacher, disciplinarian, or counselor stands without factual challenge. It is the lack of any factual, as contrasted with imagined or theoretical, connection between [the teacher's] association and a substantial weakening of the educational enterprise conducted by the board * * * that must result in a finding that the termination * * * was not constitutionally justified.

Fisher v. Snyder, 346 F.Supp. 396, 401 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

Free speech may create tumult; it may offend some of its hearers. * * * It may also create "staff anxiety." However, staff anxiety over working with someone who is critical and outspoken, who adds to the dialogue that the First Amendment was designed to foster and protect, is no reason for firing a public employee for exercising her First Amendment rights.

Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center, 356 F.Supp. 500, 508 (E.D. Pa. 1973).

School authorities must nurture and protect, not extinguish and inhibit, the teacher's right to express his ideas. Only if the exercise of these rights by the teacher materially and substantially impedes the teacher's proper performance of his daily duties in the classroom or disrupts the regular operation of the school will a restriction * * * be tolerated.

Lusk v. Estes, 361 F.Supp. 653, 660 (N.D. Tex. 1973).

[T]here is no justification for restricting the right of a teacher to engage in nonpartisan advocacy of social or political reform, absent a showing that such activity reflects substantially on his or her performance in class or interferes with the regular operation of the schools.

Alabama Education Association v. Wallace, 362 F.Supp. 682, 685-86 (M.D. Ala. 1973). (Emphasis supplied throughout.)

Pickering also established that the burden of proof in such a case rests with the employer, a position followed unanimously by the lower courts. 391 U.S. at 574; *Smith*, 502 F.2d at 517 ("incumbent upon [government] to clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of [his] duties and responsibilities"); *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 572-73 (7th Cir. 1972) (Stevens, J.), *cert. denied*, 410 U.S. 928, 943 (1973); *James*, 461 F.2d at 572; *Smith v. Losee*, 485 F.2d 334, 339-40 (10th Cir. 1973) (burden on state to adduce "clear and convincing evidence"), *cert. denied*, 417 U.S. 908 (1974); *Doherty v. Wilson*, 356 F.Supp. 35, 41 (M.D. Ga. 1973) (evidence must establish "cause to believe that the [teacher] intended to use a teaching position as a front for promoting disruptive activity, * * * or for undue proselytizing"); *Frain v. Baron*, 307 F.Supp. 27, 31-32 (E.D.N.Y. 1969); see *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509, 514 (1969); contrast *Bishop v. Wood*, 44 U.S.L.W. 4820, 4823 (U.S. Jun. 10, 1976) (where no claim "that the public employer was motivated by desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, [Court] must presume that official action was regular").

An even more striking application of this aspect of the unconstitutional-conditions doctrine is the decision in *Baird v. State Bar*, where this Court held that, absent a record which tends to show that an applicant is "not morally and professionally fit to serve honorably and well as a member of the legal profession", failure by the state to process her application and admit her to the bar because of her refusal to answer a question concerning possible subversive beliefs and associations is unconstitutional under the First and Fourteenth Amendments. 401 U.S. 1, 8 (1971).

The principles of *Pickering*, *Baird*, and similar cases control this appeal, and render frivolous any contention that the agency-shop scheme, as a condition of employment, is not repugnant on its face to those Amendments. Let us consider the record in the light of these principles. Is it a record which is deficient because it substitutes abstractions for facts, and imagined or theoretical connections between the Teachers' conduct and a disruption of the educational process for a demonstrated nexus? No—it is a record which does not rise even to that substandard level, a record barren of a single scintilla of evidence, abstract or concrete, imagined or perceived, theoretical or empirical. It is a record devoid of any hint that the Teachers' refusal to associate with the Union through the compulsory payment of fees renders them morally or professionally unfit to fulfill their duties; impairs or destroys their effectiveness as instructors, disciplinarians, or counselors; jeopardizes their abilities to contribute to a program of sound public education; materially and substantially interferes with the discharge of their duties and responsibilities; adversely affects school discipline or disrupts school activities; or serves as a mere front for undue proselytizing. In short, it is a record which, if it supports the judgment of the Michigan Court of Appeals, must implicitly enunciate the novel and startling proposition that *mere nonunionism in and of itself overbalances and outweighs any individual's usefulness as an instructor in the Detroit public schools. Or, that the acid test of an individual's competence for public employment in education is his willingness to finance a private organization unrelated to the educational process except through its own claim to control the employment relations of dissenting teachers.*

The absence of a record linking the agency-shop to the Teachers' competence as instructors, however, is certainly in keeping with the construction given PERA §10 by the Michigan Court of Appeals, and the necessary operation of that provision. For, in effect, the Michigan Court has held

that the agency-shop serves as a front through which *the Union* can coerce financial support from the Teachers for its own political and ideological activism—activism designed precisely to control the educational process in the Detroit schools. Moreover, it is through the agency-shop scheme that *the Union* threatens to destroy the Teachers' effectiveness as instructors by denying them an equality of opportunity to render public service and to contribute their own unique talents to a program of sound public education in the city. And it is the agency-shop scheme, as we have shown, which operates in favor of *the Union* to undermine the loyalties of all nonunion teachers "to support [their] superiors in attaining the generally accepted goals of education." *Pickering*, 391 U.S. at 568.

If, therefore, as this Court held in *Pickering*, the First and Fourteenth Amendments guarantee teachers the liberty to criticize a school board to which they owe professional duties and responsibilities, it follows *a fortiori* that the Teachers have an equivalent liberty to refuse to accede to demands asserted by the Union (and enforced by the Board) that they finance a process of collective bargaining and various partisan political activities which they believe are inimical, not only to their own interests as educators, but also to the interests of the Board as their employer and of the public as the ultimate beneficiary of the trust they are honor-bound to promote (see A. 12-13, 26-27, 49).

We are not, of course, unmindful of the argument that, if the Teachers and others like them are permitted to refrain from financing the Union, public education in the city of Detroit might suffer "labor unrest". Unfortunately, it is on the basis of such vague speculations, ungrounded in concrete factual findings linking specific conduct of the Teachers to particular episodes of disruption in the Detroit schools, that both the Michigan Legislature and the Court of Appeals have brought us to the sorry state of affairs which forms the predicate for this appeal. For that reason, we might be

tempted simply to disregard the claim as unsubstantiated in the record—to point out, in short, that there is no history of “instability” in public-sector labor relations attributable to the absence of agency-shop arrangements; that, if anything, the logic of collective bargaining indicates that the agency-shop aids the Union to promote and capitalize on unrest among public employees; and that, in any event, the “danger” to which appellees ultimately point is precisely the “danger” to which the First Amendment extends its protection: namely, diversity of views, “free and fearless reasoning and communication of ideas to discover and spread political * * * truth.” *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Moreover, should we embark upon that easy course, we could rely with confidence on the holding of this Court in *Pickering* that mere allegations that the exercise of First-Amendment freedoms “would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district” cannot justify suppression of that exercise, absent convincing evidence in support of the charges. 391 U.S. at 570. Considering the fundamental importance of this case, however, we cannot choose the easy course. We cannot close our eyes, and we urge this Court not to blind itself, to what the “labor-unrest” argument really means in terms of the power relationships in contemporary public-sector employment. Cf. *NAACP v. Button*, 371 U.S. 415, 435 (1963), cited in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452, 464-65 (1958). For it is the substance of this “labor-peace” argument which exposes the true character of the agency-shop scheme as a naked assault upon the Teachers’ fundamental freedoms of speech, association, petition, and self-determination.

Bluntly put, the “labor-peace” argument is a euphemism for extortion, a circumlocution for the threat that the Union will undertake to interfere with the provision of educational services if public officials (and, ultimately, the courts) do not

aid and abet it in compelling political and ideological conformity in the Detroit schools. It is, in short, an attempt to raise the rationale of the “protection racket” to the level of a rule of constitutional law. We must therefore admit that recognition of the Teachers’ First- and Fourteenth-Amendment freedoms in this case may in a certain way pose a potential danger to the public interest. But we must also immediately add that it is a threat to the public interest which arises (if at all) from activity of the Union, not from any conduct of the Teachers which the state may constitutionally suppress, or the suppression of which this Court should condone.

Although in narrowly defined circumstances government may limit or proscribe the exercise of speech to prevent the speaker from intentionally provoking a given group to hostile reaction, the mere possibility that persons with lawless and violent proclivities may attempt physically to censor First-Amendment activity provides no legitimate reason for the state to effectuate that censorship itself in the name of “peace” or “order”. That the exercise of First-Amendment freedoms may often be annoying or even offensive to some is no constitutional ground to deny those freedoms. “[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. * * * But our Constitution says we must take this risk * * *.” *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 508 (1969); accord, *Cohen v. California*, 403 U.S. 15, 20, 23 (1971); *Terminiello v. City of Chicago*, 337 U.S. 1, 2-3 (1948); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (1971); *Street v. New York*, 394 U.S. 576, 592 (1969); *Spence v. Washington*, 418 U.S. 405, 412 (1974); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965); contrast *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Moreover, what government may not deny to satisfy the intolerance of private parties it may not make the subject of direct state censorship, either. “[T]he curtailing of expression

which [government officials] find abhorrent or offensive cannot provide the important governmental interest upon which impairment of First Amendment freedoms must be predicated." *Gay Students Organization v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974), citing *Papish v. Board of Curators*, 410 U.S. 667, 670 (1973); *Healy v. James*, 408 U.S. 169, 187-88 (1972).

And just as an individual's freedoms to speak, associate, and petition are not contingent upon the willingness of others to refrain from threats, harassment, and violence, so too are his freedoms *not* to speak, associate, or petition independent of the wills and demands of others. See *supra* pp. 40-46. For if the First and Fourteenth Amendments entitle each citizen to voice controversial ideas, they entitle no citizen, as an individual or in an association, to force his ideas and opinions on his neighbors. See *Gray v. Union County Intermediate Education District*, 520 F.2d 803, 807 (9th Cir. 1975). Under our Constitution, unity of opinion is to be fostered by persuasion, not by persecution.

Nor may government effect a coerced consensus—even in the name of such basic interests as national unity. In *Board of Education v. Barnette*, Mr. Justice Jackson reminded us that the diversity of views which the First and Fourteenth Amendments guarantee is the very life-blood of our society, and that any attempt to drain it away can have none but fatal consequences for our freedom:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. * * * As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. * * * Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

319 U.S. 624, 640-41 (1943).

If we emphasize what should appear as elementary propositions of constitutional jurisprudence, it is because their message has not yet penetrated to those who support the agency-shop as a means of achieving "labor peace". Public employees, such as the Teachers, who dissent from compulsory-unionism arrangements themselves constitute no grave and immediate danger to the stability and effectiveness of public-sector labor relations. What poses a real and serious threat is the intolerance of union leaders and their misguided adherents, who all too often resort to harassment, intimidation, and even physical violence to attempt to coerce the "solidarity" among employees which they cannot bring about through peaceful persuasion and argument. It is union leaders, characteristically, who harass and incite animosities against nonunion employees—especially in situations where applicable law precludes agency-shop or other compulsory-unionism arrangements. See, e.g., *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 266-68 (1974). And the Union has engaged in such activity here.³³ For public employees, such as the

³³One of the *Abood* plaintiffs described typical incidents in an affidavit filed with the Michigan Court of Appeals:

I have been subjected to other forms of harassment by the DFT. In November of 1973 the plastic name strip on my school mailbox was removed, and replaced with a name sticker which read "BARB SCAB." I removed this plastic strip and sent it to the principal's office, with a message that I did not feel that this type of action was appropriate for the union to undertake in the schools. I received no response from the principal. * * * A second identical strip was later placed on my mailbox.

Additionally, I received in my school mailbox a student grade form filled out as follows * * * : "PEDERSON has completed SCAB I with a mark of A * * * ." Again on May 28, 1974, I received through my school mailbox a paper that read as follows: "Cost of living getting you down? Your 1973 W-2 statement somewhat shocking. The following teachers found a partial solution — Work during a strike!" Fifteen teachers' names were included on that list, including mine.

R., Affidavit of Barbara H. Pederson, attachment to Objection to Appellees' Application for Rehearing or Clarification (Mich. Cir. Ct., Apr. 28, 1975).

Teachers, who see the duties they owe to government and to society as incompatible with blind allegiance to any private organization, frustrate the unions' goal to coerce economic and political concessions from the state by interfering with the provision of public services.³⁴ For that reason, intima-

³⁴In their respective complaints, the Teachers alleged that

collective bargaining in public employment in Michigan has disadvantages which outweigh its advantages to individuals embraced within the bargaining unit, and to the public at large, particularly with reference to teachers and to Plaintiffs, among such disadvantages being * * * [s]trikes called, sponsored and encouraged in violation of law.

(A. 12, 49.) The Teachers offered to prove the above allegation as part of their opposition to appellees' first motion to dismiss (A. 21). They supported that offer with accompanying affidavits. *E.g.*, Affidavit of Charles A. Benson at 4-5 (A. 26-27):

I do not believe that teachers should strike in violation of law. Yet the Detroit Federation of Teachers has struck in the past and doubtless will threaten to strike in the future. It is the official policy of the American Federation of Teachers to endorse teachers' strikes and to work for the removal of legislation prohibiting strikes. Strikes by teachers are on the increase. I think this is detrimental to the teaching profession, and will in time also impose an economic hardship on many teachers who are forced to remain out of work during a strike, against their will. In addition, teachers' strikes as endorsed by the Federation, are highly detrimental to education, the community as a whole, and the children in the public schools.

The truncated record in this case as yet contains no evidence of strikes instigated or encouraged by the Union. But reported decisions in other cases show that the Union has been involved in strikes, along with other Michigan affiliates of the American Federation of Teachers. *Board of Educ. v. Detroit Fed'n of Teachers*, 55 Mich. App. 499, 223 N.W.2d 23 (1974); *Stillwell v. Detroit Fed'n of Teachers*, 88 L.R.R.M. 2266 (Mich. Cir. Ct., Wayne Cty., 1974); *Lake Michigan College Fed'n of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3351 (U.S. Nov. 12, 1975) (No. 75-698); *Board of Educ. v. Taylor Fed'n of Teachers*, 66 Mich. App. 695, 239 N.W.2d 713 (1976). The Michigan PERA, of course, prohibits strikes by public employees, including teachers. Mich. Stat. Ann. §17.455(2) (1975 rev.).

tion and violence aimed at nonunion employees are not foreign to public-sector "labor disputes":

Often a proportion of the employees in the bargaining unit will cross the union's picket lines. *Their efforts will release the pressure on supervisory personnel and will broaden the range of services that can be continued. By breaking ranks with the union, these employees expose themselves to personal attacks by union adherents. During the strike, extra precautions must be taken to protect the employees' property, homes and families. Where union picketers are violent, this protection may extend to the provision of food and bedding at the job site. After the strike, it may be necessary to separate these employees from the strikers so as to avoid harassment and confrontation.*

Mulcahy & Schweppe, "Strikes, Picketing and Job Actions by Public Employees", 59 *Marq. L. Rev.* 113, 130 (1976) (emphasis supplied). And the Union has engaged in such activity here.³⁵ This, then, is the true import of the "labor-peace" argument: First, that public employees whose personal beliefs cause them to eschew associations with unions, or who seek diligently to perform their tasks as public servants in the face of union demands to desist, thereby expose their persons, their property, their homes, and their families to retaliatory confrontations, harassment, and outright attacks at the hands of union partisans. And secondly, that *therefore* they should be compelled by legislature and courts to surrender *in addition* their freedoms of speech, association, petition, and employment to control by those same unions.

³⁵One of the *Warczak* plaintiffs described a typical incident in an affidavit filed with the Michigan Court of Appeals:

Again in late 1973, I received notices from the DFT that I would have to pay either dues or fees in order to keep my job. At about the same time, the DFT representative in *Fleming Elementary* said to me, "We'll see that you lose your job," because I had worked during the DFT's illegal strike in September, 1973.

R., Affidavit of Beverly De Mers Pearsall, *attachment to* Objection to Appellees' Application for Rehearing or Clarification (Mich. Cir. Ct., Apr. 28, 1975).

If we were to take this sophistry seriously, we might suggest several decisive rejoinders. For instance, to the assertion that "labor peace" should weigh more heavily on the constitutional scales than dissenters' First- and Fourteenth-Amendment freedoms, we could respond that the Michigan Court of Appeals has already determined that "freedom of expression is a constitutional right so basic to our form of government that it must be jealously guarded", even against the "countervailing" Michigan policy of "labor stability" (A. 102). Or, to the assertion that, without compelled conformity, the example of dissenting teachers will encourage other employees to withdraw from union affiliation and support—thereby causing "fragmentation" and undermining union strength, we could respond that a union has no claim in reason or law to stifle dissent simply because that dissent may be effective. "[T]he group in power at any moment may not impose * * * sanctions on peaceful [exercises of First- and Fourteenth-Amendment freedoms] merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Thornhill v Alabama*, 310 U.S. 88, 104 (1940). Or, to the assertion that the right to dissent must be "balanced" against the "'competing right' to join effective unions", we could respond that "the rights of [dissenting] employees to work for whom they will, and, undisturbed by annoying importunity or intimidation of numbers, to go freely to and from their place of labor", and "the right of the employer * * * to free access of such employees", are "primary"—and even more so in the public sector than in the private. *American Steel Foundries v. Tri-City C.T. Council*, 257 U.S. 184, 206 (1921). But to prepare a catalogue of such detailed counter-arguments would be to bring owls to Athens. For long ago John Locke, the spiritual father of our Constitution, exploded the notion that those who exercise their liberties in the face of suppression, and defend them against aggression, somehow endanger "peace". "They may as well say upon the same ground", he argued,

that honest Men may not oppose Robbers or Pirates, because this may occasion disorder or bloodshed. If any mischief come in such Cases, it is not to be charged upon him, who defends his own right, but on him, that invades his Neighbours. If the innocent honest Man must quietly quit all he has for Peace sake, to him who will lay violent hands upon it, I desire it may be consider'd, what kind of a Peace there will be in the World, which consists only in Violence and Rapine; and which is to maintain'd only for the benefit of Robbers and Oppressors.

Second Treatise on Government §228 (P. Laslett ed. 1960).

Many conflicts exist in our society, among which those generated by the attempt of union leaders to coerce political conformity among public-sector employees is not the most severe. But in controversial matters of public-employee unions and unionism, no less than in matters of interracial antagonism, the state cannot legitimately promote preservation of the public peace by depriving innocent citizens of their constitutional rights and privileges. Government cannot legitimately deny constitutional rights—to minority races or to nonunion teachers—simply because of hostility to their assertion or exercise. E.g., *Buchanan v. Warley*, 245 U.S. 60, 80-81 (1917); *Watson v. City of Memphis*, 373 U.S. 526, 535-36 (1963).

Finally, our refutation of the "labor-peace" argument provides an appropriate context in which to point out a fundamental distinction between this case and *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), the decision upon which both the Michigan Court of Appeals and the appellees' erroneously rely, and which we shall discuss at length in Part III., *infra* p. 187. In *Hanson*, this Court held that securing "industrial peace" along the arteries of commerce is a legitimate object of the federal government, and that the choice by Congress to permit railway employers and unions to enter into limited union-shop arrangements is not without a rational basis. 351 U.S. at 233-34. *Hanson*, of course, dealt with employment in the private sector, where national labor policy recognizes the privileges of both em-

ployers and unions to employ economic coercion as a weapon in the bargaining process. *E.g.*, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317-18 (1965); *NLRB v. Insurance Agents*, 361 U.S. 477, 488-89 (1960). In that context, where the economic struggle is a wholly private affair, there may be a rational basis in the belief that permitting the parties voluntarily to enter into union-shop arrangements, *not unlike those into which they might have entered at common law*, could tend to stabilize industrial relations. *See supra* pp. 13-15. Such is not the case in the public sector, however. For in the public sector, "labor strife" is, not merely an economic struggle between private parties, but *an economic and political conflict between society, on the one hand, and public-sector unions, on the other*. Public-policy decisions, to be sure, may rest upon many grounds. *But the very nature of government requires above all else that threats by private groups be absolutely excluded from the catalogue of reasons that the state may advance in support of legislation which peculiarly benefits those groups at the expense of other segments of society*. Indeed, political extortion is not only a nonrational basis for governmental action, but also a compelling reason for voiding that action on the most fundamental possible grounds: namely, that no government can demand the obedience of any man to laws dictated by private parties to whom he owes no allegiance and from whom he can expect no protection.

The reasoning of *Hanson* on the issue of "labor peace", therefore, is irrelevant in the public sector. Indeed, where First-Amendment freedoms are at stake (as they were *not* in *Hanson*), that decision would be irrelevant even in the private sector. Suppose, for example, that, in order to suppress articles in the public press critical of certain powerful trade unions, the unions engaged in nationwide strikes, threatening to throttle the country's economy until Congress should forbid the publication of such articles. Would anyone contend, on the basis of *Hanson*, that this court might uphold

congressional power so to censor the press on the theory that such censorship has a rational basis—or even that this Court might find the interference with interstate commerce so occasioned by the unions a compelling governmental interest justifying prohibition of the provocative articles? Obviously not. *Cf. Terminiello v. City of Chicago*, 337 U.S. 1 (1949). It hardly seems, then, that we should expect a different result where "labor unrest" is directed, in the first instance, to compelling government to make concessions, not at the expense of one group, but at the expense of society in general.

C.

On its face, the agency-shop scheme is an overbroad extension of the exclusive-representation device which enhances the ability of the Union to suppress the Teachers' academic freedom, to exercise disproportionate political power at the expense of all other citizens, and to usurp prerogatives of sovereignty from the state.

We have already presented what, under normal circumstances, would be a more than sufficient case for the unconstitutionality of the PERA agency-shop scheme. On the one hand, we have shown that it is a direct attack on the Teachers' political and ideological autonomy, in the form of a prior restraint on "positive" and "negative" First- and Fourteenth-Amendment freedoms—and is therefore unconstitutional *per se*. *Supra* pp. 85-99. On the other hand, we have shown that, even if the "balancing test" were applicable here, the agency-shop is nevertheless unconstitutional on its face—since it serves neither a compelling nor an important nor even a legitimate state interest, and has already been adjudicated by the Michigan Court of Appeals to be an overbroad infringement on freedom of speech. *Supra* pp. 115-28. We believe, however, that the constitutional issues raised in this appeal are so fraught with significance that we cannot content ourselves with, nor limit this Court's purview to, what would be an adequate argument in the normal run of cases. Therefore, in this subpart we shall go further, and examine what we

assert are compelling public interests which militate *against* the agency-shop scheme, and foreclose any serious debate on its repugnance to our Constitution.

Our analysis shall focus on three particular consequences of the agency-shop in the system of compulsory collective bargaining to which it is an adjunct. In Part II.C.2, *infra* p. 153, we shall show that the scheme is incompatible with the Teachers' professional sovereignty, or academic freedom, which lies at the very heart of our educational system. In Part II.C.3, *infra* p. 164, we shall show that it is equally incompatible with popular sovereignty, or representative government, which lies at the heart of our constitutional system. And in Part II.C.4, *infra* p. 176, we shall show that it is even incompatible with governmental sovereignty, without which an ordered, let alone a free, society cannot long survive.

Our purposes in these subparts will not be to argue once again that the appellees have failed to justify the agency-shop scheme under the "balancing test". We have already won that argument. *Supra* pp. 115-28. Here we shall explain how the agency-shop constitutes an overbroad extension of the exclusive-representation device, an extension fundamentally incompatible with the public interest. This appeal, of course, does not raise the question of the unconstitutionality of exclusive representation in public employment. Therefore, we must and shall refrain from addressing the merits of that issue, secure in the knowledge that they will wend their tortuous way to this Court, sooner or later. But, while refraining from a direct attack on exclusive representation, we are none the less compelled to draw that purely statutory device into our constitutional analysis. For the Michigan Legislature has based such meagre justification as it has advanced for the agency-shop on the notion that the scheme is necessary to compel all employees to "share fairly in the financial support of their exclusive bargaining representative". PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.).

What we shall urge upon this Court is the necessity of its scrutinizing with care the consequences of pursuing the implications of the exclusive-representation device as single-

mindedly and relentlessly as has Michigan in the PERA agency-shop scheme. In effect, *Michigan has elevated a purely statutory and constitutionally doubtful device above the most highly prized and jealously guarded of all constitutional principles: individual autonomy in political thought and action.* And whatever the place of the exclusive-representation device in our society, it cannot justify this result—not only because the immediate effect of the agency-shop is to abridge the Teachers' First- and Fourteenth-Amendment freedoms, but also because the ultimate erosion of constitutional values of which it is a part will wash away academic freedom entirely and seriously undermine popular and governmental sovereignty.

As we shall show, these are not idle fears. If the logic of exclusive representation can be extended, through the agency-shop, to stifle the Teachers' freedoms of speech, association, and petition while compelling them to finance their own induction into the "goose-stepping brigades" of political conformists foreseen by Mr. Justice Douglas in *Lathrop*,³⁶ then the already enormous and overweening political power of public-sector unions cannot but significantly increase—at the expense of an electorate already in a position of political disadvantage *vis-a-vis* these unions. *Infra* p. 164. In short, to countenance the relentless pursuit of the implications of the majority-rule device evidenced by the PERA agency-shop scheme is to expose popular sovereignty in this country to a peril outside of its experience and perhaps beyond its capacity to resist.

We repeat: Our concern here is *not* to attack the principle of exclusive representation as such. Our concern is to warn this Court *against* the consequences of Michigan's indiscriminating and remorseless pursuit of that principle, and to demonstrate how such a pursuit, if permitted (as the appellees urge) to extinguish whatever constitutional freedoms may "get

³⁶367 U.S. at 884-85 (dissenting opinion).

in the way", will destroy not only the basic liberties of dissenting public employees but also the fundamental structure of the American polity. Our concern is to point out that, if any compelling public interest exists in respect of the agency-shop, it is the interest in protecting the privilege of the Teachers to refrain from financing the Union's political ambitions. *This* interest is conformable to and congruent with all other public interests, especially the interest in preserving popular sovereignty. And it can be served, if the Teachers' challenge to the agency-shop is upheld here, merely by restraining an unnecessary extension of the exclusive-representation device. This case therefore presents a rare jurisprudential "bargain" in the accommodation of public policy to fundamental constitutional principles. For the Court can provide invaluable protections to popular sovereignty and individual liberty at the cost of only an incidental and unimportant limitation of the majority-rule scheme.

Before we begin discussion of these matters, however, we should establish the necessary context by amplifying an important point heretofore only adumbrated: to wit, the nature of compulsory collective bargaining under the Michigan PERA. And to that we now turn.

I.

Even without the agency-shop, compulsory public-sector collective bargaining permits unions acting as exclusive representatives to exercise extraordinary authority over public employees and extraordinary influence upon the formulation of public-employment policy.

Especially in the public sector, there is a critical difference between voluntary and compulsory collective bargaining. The essence of the distinction is to be found in the dichotomy between freedom and coercion—between doing what one

wishes to do and doing what one is forced to do. Free collective bargaining involves negotiations between willing parties on both sides: employees who freely appoint agents to bargain for them; and employers who prefer to bargain with those agents rather than with the employees as individuals. Free collective bargaining was always an option for employers and employees at common law; and, interestingly enough, had not this Court later overruled the statutory construction on the basis of which it originally upheld the constitutionality of the Railway Labor and National Labor Relations Acts, it would have been essentially the rule under statutory private-sector collective bargaining as well. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 252-54 (1917); compare *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49, 557-59 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-46 (1937), with *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944), and *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944).

Compulsory collective bargaining, conversely, involves two components unknown at common law—one relating primarily to employees, the other to employers. With respect to employees, such as the Teachers, the central characteristic of compulsory collective bargaining is the majority-rule principle, enforced through the device of exclusive representation. Having been designated by a majority of employees in an appropriate bargaining unit, the Union is the *exclusive representative* for *all* employees in the unit, whether they voted in its favor, against it, or not at all. Mich. Stat. Ann. §17.455(11) (1975 rev.). As their exclusive representative, the Union plays a dominant and controlling role in the Teachers' employment destinies, both as regards determination of the terms and conditions of their employment and as regards the prosecution of their employment grievances. So great, indeed, is the power of exclusive representatives over employees, that unions granted this status have frequently been called "gov-

ernments", even by those who favor compulsory collective bargaining. Professor Clyde Summers, for example, had this to say of a union exercising the powers of an exclusive representative:

A union, in bargaining, acts as the representative of all workers within an industrial area. It weighs alternatives and determines policies which vitally affect all those whom it represents. It negotiates a contract which becomes the basic law of that industrial community. In making these laws, the union acts as the worker's economic legislature. After the laws have been made, the union is charged with their enforcement, and through its grievance procedure helps judge their interpretation and application. It is the worker's policeman and judge. *The union is, in short, the employee's economic government. The union's power is the power to govern.*

"Union Powers and Workers' Rights," 49 Mich. L. Rev. 805, 815-16 (1951) (emphasis supplied).

Although we shall discuss the point in more detail hereafter, it would not be premature to note at this juncture some of the practical and conceptual difficulties that inhere in the characterization of exclusive representatives which Professor Summers has presented. Political government in operation is not a mere abstraction. It is a set of daily tasks, performed by human beings, which (on the whole) are thought vital to the very existence of an ordered and free society. If those human beings employed by government for the performance of its critical functions are subjected—compulsorily—to *another* "government", *another* "sovereign" (as Professor Summers suggests they are), then there must arise a condition of disorder pregnant with the potential for chaos. See *infra* pp. 176-86.

With respect to employers, the central characteristic of compulsory collective bargaining is an *enforceable* duty to bargain—which means, simply, that the appellee Board is pushed, virtually compelled, to arrive at an agreement with the Union with respect to all terms and conditions of the

Teachers' employment. See Mich. Stat. Ann. §17.455(15) (1975 rev.). Employment rules may not come from the Board's unilateral decisions; nor from civil-service rules made by governmental agencies pursuant to laws enacted by the state legislature; nor from bilateral negotiations between the Board and the Teachers. The "legislation" governing terms and conditions of employment, as Professor Summers points out, must be the product of two *concurrent authorities*: the Board and the Union.

This, then, is the set of institutions which make up compulsory public-sector collective bargaining. Having established this context, we are now prepared to expose the effect of the agency-shop on academic freedom, representative government, and (ultimately) governmental sovereignty itself.

2.

As an instrument for compelling political and ideological conformity among teachers, the agency-shop is incompatible with academic freedom.

If this case has a unique aspect, it is that the unconstitutional agency-shop requirement in issue here is directed at public-school *teachers*—who, we submit, occupy a special place, not only in our society, but also in the favor of the First and Fourteenth Amendments. It is appropriate, therefore, to begin discussion of the compelling public interests against the agency-shop scheme by presenting our position on these special matters. Briefly put, it is this: The commitment of our society to public education makes protection of the values inherent in academic freedom one of the state's most compelling duties. Permitting school officials to cooperate with organizations such as the appellee Union in imposing political and ideological conformity on dissenting teachers, however, is incompatible with the fulfillment of this duty.

And for that reason, there is a compelling public interest against the PERA agency-shop scheme. We shall focus our argument on two points: (a) This Court has repeatedly singled out self-determination for teachers in the exercise of their freedoms of belief, speech, and association as vital to the preservation of that free spirit of academic inquiry without which our society cannot progress. (b) By stifling dissenting teachers' self-determination through the agency-shop, the Union can use compulsory public-sector collective bargaining to pervert the system of public education into a mechanism for indoctrinating students with the narrow political and ideological views of union leaders.

a. Academic freedom for individual teachers is a vital public concern which occupies a special preserve in the First and Fourteenth Amendments.

To emphasize the central position that public education, academic freedom, and self-determination for teachers play in our society, we could refer this Court to no authority more penetrating or eloquent than Mr. Justice Frankfurter's concurring opinion in *Wieman v. Updegraff*. "That our democracy ultimately rests on public opinion", he observed,

is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and

practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry.

344 U.S. 183, 196 (1952).

Mr. Justice Brennan was of a like mind when he wrote in *Keyishian v. Board of Regents*:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. * * * The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." * * * In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, we said:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

385 U.S. 589, 603-04 (1967).

Thus this Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools", and that the First and Fourteenth Amendments provide the primary guarantee that the academic community will remain an example of open-mindedness and free, critical inquiry. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Again, Mr. Justice Frankfurter's concurrence in *Wieman* reminds us that

[b]y limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom

of association, the Fourteenth Amendment protects all persons, no matter what their calling. *But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. * * * [U]nwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.*

344 U.S. at 195 (emphasis supplied).

Considerations such as these counsel the rigid exclusion of governmental interference from the intellectual life of our public schools—whether that intervention occurs in a straightforward manner “or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.” *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). And this is true with respect not only to freedom of speech and association in purely academic matters, but also to the free and equal participation of teachers in debate on how their schools should be administered and public funds allotted to various operations in the schools. *Keyishian v. Board of Regents*, 385 U.S. 589, 607 (1967); *Pickering v. Board of Education*, 391 U.S. 563, 572 (1968).

In sum, we believe that this Court has unequivocally established that the First and Fourteenth Amendments secure for all teachers, irrespective of their affiliations with lawful private groups, a freedom of intellectual and professional self-determination, or personal sovereignty, of a sanctity as inviolate as the services they render to our democratic system are indispensable. The Amendments prohibit any form of governmental interference with academic affairs, not directly

and demonstrably related to professional competence, which tends to deprive teachers of the widest possible ambit for liberty of thought, speech, and association. For without that liberty, teachers could hardly hope to develop the faculties of open-mindedness and critical inquiry, or to exercise the free play of the spirit essential to their roles as exemplars of enlightened and responsible opinion.

Moreover, it goes without undue emphasis that the academic freedom which (in Mr. Justice Brennan's words) “discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection’”, is a freedom essentially *individual*, not collective, in nature. It is a freedom for each teacher to cast off the intellectual strait jacket of any orthodoxy—and to follow the dictates of his own conscience, immune from any command that he blindly conform his behavior to that of his colleagues.

But if this is the substance of the academic freedom which our Constitution protects, then the essential and inevitable effect of the PERA agency-shop scheme, and the tendencies of public-sector labor organizations such as the appellee Union to employ collective bargaining for their own narrow political and ideological purposes, make clear that the agency-shop is out of place in public education.

b. The agency-shop in public education defeats the purposes of academic freedom by imposing political and ideological conformity on dissenting teachers and students alike.

First, from the perspective of individual nonunion teachers, the agency-shop scheme is, simply put, a mechanism for stifling academic freedom by imposing political and ideological conformity.

We have already shown that payment of agency-shop “fees” has no rational relationship to the professional competence, moral character, or any other job-related credential of any teacher. *See supra* pp. 62-80, 132-47. The nonpayment of those fees, however, does have a rational relationship to *beliefs*: namely, to the beliefs of the Teachers that the principles and

policies of the Union are incompatible with the Teachers', their students', and the public's best interests, in respect of public education and otherwise. And their beliefs as to the merits of the Union and the effects of unionism on the public schools are one aspect—and, we submit, a vitally important aspect—of their academic freedom. For if academic freedom means anything, it means that the Teachers have a right to liberty of thought *and action* with regard to each and every matter that they feel affects their capacities to teach.

The PERA agency-shop scheme strikes directly at these beliefs. In essence, through coerced financial contributions and the pressures those contributions impose towards full membership, the law importunes the Teachers to conform their professional lives to the tenets and tactics of trade unionism. And its effect on freedom of association is clear: Can anyone imagine that, faced with the stark realities that agency-shop fees are identical to membership-dues and that only full union members have any opportunity to influence the course and content of collective bargaining and the Union's other political and ideological activities (*see* A.11, 27-28, 48), large numbers of nonunion teachers will not be compelled to participate in union affairs—not as *dissenters*, but as *regular rank-and-file unionists*? *See supra* pp. 99-115. And that being so, can anyone imagine that new or potential teachers in even larger numbers will not recognize the futility of dissent and concede control over their careers to the Union, from the beginning? And will not this behavior exemplify the very "caution and timidity in their associations" which Mr. Justice Frankfurter warned us in *Wieman* would be the inevitable result of an "unwarranted inhibition upon the free spirit of teachers"? *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). But these questions answer themselves.

Secondly, the agency-shop scheme strikes directly at the interest in personal identity so important to the Teachers' academic freedom. The only legitimate rationale for the

exclusive-representation device is that it promotes administrative convenience by creating a single "voice" *for the work unit taken as a whole*. No one even pretends, however, that an exclusive representative is, in any proper sense of the term, the "spokesman" for *dissenting* employees *as individuals*. But when the Michigan Legislature went beyond exclusive representation, and appended the unnecessary and overbroad agency-shop authorization to PERA §10, it established a predicate on the basis of which the Union can parade as the Teachers' "spokesman": namely, the notion that the Teachers must finance the Union's activities because those activities are somehow "beneficial" to (and therefore implicitly approved by) the Teachers. *See* PERA §10(2), Mich. Stat. Ann. §17.455(10)(2) (1975 rev.). Indeed, before this Court the Union itself will no doubt dilate on the evil of "free riders"—thereby intimating that, for some unexplained reason, the Teachers should not be categorized as *forced passengers* (although that is a more accurate description of the effect of exclusive representation). Such arguments will be unavailing in this forum; but elsewhere, the existence of the agency-shop enables Union leaders to beguile the public into erroneously identifying the Teachers with the Union's political positions and programs—providing one more example of the recent tendency of state and federal governments to foster and support institutions which submerge dissenting individuals in huge and impersonal collectives, at the cost of basic liberties.

Now pending before this Court is a case which perfectly illustrates the problem posed by wantonly elevating statutory devices designed to serve evanescent considerations of expedience over constitutional principles written to preserve permanent human values from infringement by state coercion. We refer to *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, *prob. juris. noted*, 96 S. Ct. 1408 (1976). In that case, the Wisconsin Supreme Court applied the logic of exclusive representation with almost fanatic single-mindedness to deny to nonunion public-

school teachers any right or privilege under the First and Fourteenth Amendments to petition their employer, an agency of state government, with respect to matters of intense public concern relating to an agency-shop scheme then being negotiated between the school board and the teachers' exclusive representative. In effect, the Wisconsin Court held that *nonunion teachers have no political personality of their own which they can assert against a demand for censorship by their exclusive representative*—that they are, in the classic Orwellian sense, *nonpersons*. Here, indeed, is the authentic voice of modern totalitarianism whispering from the pages of our judicial reports: the idea that the individual cannot be allowed to question, let alone to criticize, "Big Brother"; that the individual can take no position separate from the mass on controversial issues; that, in short, the impetus for thought and action must radiate from a single center outwards, sweeping individuals willy-nilly into *organizations* and *movements* which propel them forward on a course chartered by an elite coterie of "guardians".

The PERA agency-shop scheme is the obverse of the coin minted by the Wisconsin Court in *City of Madison*: the idea that the individual must affirmatively support "Big Brother" with his labor, if not his love; that the individual must lend his voice, directly or indirectly, to the mass chorus; that, in short, the individual must subordinate his separate identity to the collective personality—becoming (in the words of an administrator sensitive to the "new order" being forged in public-sector labor relations) just another "faggot in a large bundle". Port Umpqua Educ. Ass'n Request for "Fair-Share" Determination, Oregon PERB No. C-275, at 6 (Jan. 17, 1975) (recommendation by board agent J.B. Daniels). How these ideas could be compatible with academic (or any other kind of) freedom, we cannot imagine. Neither do we believe that this Court can provide us with an answer other than that the agency-shop scheme represents such a danger to the independence of individual teachers in our public schools that there exists a compelling public interest in disallowing it.

Finally, by strengthening the power of teacher-unions to misuse collective bargaining as a means of interfering in the educational process, the agency-shop scheme poses a distinct danger to the public interest. It is unnecessary to document the assertion that contemporary public education, especially in urban areas, is in a state of crisis. "Big city school systems", two noted political scientists tell us, "are commonly recognized to be in trouble, trouble relating to poor performance by students, high dropout rates, alienation of students and parents and rising costs." R. L. Bish & V. Ostrom, *Understanding Urban Government* 3 (1973). Admittedly, the abuse of compulsory public-sector collective bargaining by teacher-unions is not solely responsible for this state of affairs. But it has been a strongly contributing factor. In *Teachers and Power*, Mr. Robert J. Braun, Education Editor of the Newark (N.J.) *Star-Ledger*, detailed the policies which the American Federation of Teachers (parent organization of the appellee Union) has characteristically promoted, and their adverse effect on the public interest. Union pressure, Braun contends, has made public education so expensive that it now threatens to bankrupt the large cities. The union has opposed efforts by boards of education to "contract out" the teaching of basic skills to private firms which agree to payment contingent on acceptable academic performance by the students. It has opposed voucher systems which would permit parents to send their children to schools of their own choice. It has resisted, usually successfully, attempts by minority groups to decentralize big-city schools so as to tailor the education of minority children to their special needs. In short, according to Braun, the union is interested mainly, if not exclusively, in higher pay, lighter work-loads, and less and less emphasis on training in basic skills but more and more emphasis on devoting classroom time to "discussion" of controversial socio-political issues. *Teachers and Power* 244-76 (1972).

It is not surprising, then, that the AFT has done its best to suppress Mr. Braun's book, and its basic message: that *the union's fundamental interest in collective bargaining is to gain power to control the public-school system*. See *The Village Voice*, Dec. 21, 1972, at 35 (article by Nat Hentoff concerning the libel action threatened against both Braun and his publisher). For Braun's assertions are hardly an eccentric view. In one review of the book, Mario D. Fantini, Dean of Education of the State University of New York, quoted favorably the following description of the AFT:

Because it is a union first and foremost, its organization is geared to war, to servicing strikes, to collecting new members * * *.

* * * * *

[T]he union hardly has displayed a depth of understanding of either the political or the educational process which would motivate a community willingly to turn over its schools to its kindly command. And there is little in its history, its present operations or its leadership, to indicate that the A.F.T. would know what to do with the public schools of the nation should it manage to assume control through contract—beyond, of course, increasing salaries, decreasing workloads, picking up more members and strengthening leadership control at the top.

According to Dean Fantini, "Braun is essentially correct in his assessment; teacher organizations do appear to be on a collision course with the public." Book Review, *The New York Times*, May 28, 1972, at 3.

In another review of the book, Mr. Mortimer Smith of the Council for Basic Education observes that we "are moving rapidly towards a monolithic situation where teachers will be expected to be loyal not to the school or to the children or the administration or school board, but to the union." He, too, quotes favorably Mr. Braun's conclusion to the effect that the AFT has no real interest in education, that its main objective is "freedom from administrative and parental

interference", that as its power grows "the kids will be pawns in the game", and that citizens "would even have less, perhaps nothing, to say about the direction of the school to which [they] send [their] children and [their] tax dollar." Book Review, *Council for Better Education*, Sept. 1972.

So long as taxpayers remain a diffuse, unorganized group, while public-sector unions enjoy the special, compact political power derived from compulsory collective bargaining, the exclusive-representation device, and now the *agency-shop*, the taxpayers must fight the losing battle Mr. Smith describes. As respected commentators have pointed out,

if a teachers' union were to insist through collective bargaining (with the strike or its threat) upon major changes in school curriculum, would not that union have to be considerably less skillful and efficient in the normal political process than other advocates of community change? *The point is that with respect to some subjects, collective bargaining may be too powerful a lever on municipal decision-making, too effective a technique for changing or preventing the change of one small but important part of the "current state of affairs."*

Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 860 (1970) (emphasis supplied).

What, indeed, are the political implications of converting public education from a public trust into a platform where union activists can first coerce political and ideological conformity among dissenting teachers, and then indoctrinate impressionable students with the union "line" on difficult and controversial social issues, instead of concentrating on basic learning skills? Parents send their children to school to provide them with hard information from objective instructors, not propaganda served up by agitators passing as teachers. And in a system unhampered and undistorted by special advantages given to a privileged group to coerce conformity with its designs, parents would have a chance to

receive from the public schools the sort of services that accord with the community's consensus as to its needs. The model of a free society presumes that

[d]ecisions of the municipal government emanate from *no single source*, but from many centers; conflicts and clashes are referred to *no single authority*, but are settled at many levels and at many points in the system: *no single group* can guarantee the success of any proposal it supports, the defeat of every idea it objects to.

Kaufman, "Metropolitan Leadership", *quoted in* N. Polsby, *Community Power and Political Theory* 127-28 (1963) (emphasis supplied). But the model of a free society presupposes that no social group possesses special powers and privileges of compulsion and coercion such as the Union does under the PERA agency-shop authorization. When the presuppositions are not satisfied, the system fails. It is as simple as that, and as tragic.

The public interest in education and the agency-shop are mutually incompatible. That being so, there can be no justification for imposing that scheme on the Teachers, at the cost of their academic freedom.

3.

As an instrument for financing the Union's political and ideological activism, the agency-shop is incompatible with representative government.

The idea that our political system presumes the absence of any single source, authority, or group which can guarantee the success of every proposal it supports or the defeat of every program it opposes leads us directly to the second fundamental conflict between the agency-shop and the public interest: namely, the conflict between specially privileged union political power and popular, representative government. We shall consider three points: (a) Fundamental to our system of government is legal equality of opportunity, for all individuals, to influence the political decision-making process.

(b) The coercion to ideological conformity worked by the agency-shop threatens to pervert the process of government by providing an extraordinary measure of political influence to union leaders. (c) This Court has already indicated in the Hatch-Act cases that such a result is incompatible with the public interest.

a. All citizens, whether organized in public-sector trade unions or not, have an equal interest and right to participate in the process of representative government.

The American system of representative, republican self-government is based on the presupposition that the state may act only for the *common*, or *public*, good. As so many of our constitutional traditions do, this concept traces back to the thought and writing of John Locke. *See, e.g., Second Treatise on Government* §§89, 110, 131, 135, 142 and *passim*. From the very beginning of our nation, we have taken it as an article of faith that

government is, or ought to be, instituted for the common benefit, protection and security of the people * * * and not for the particular emolument or advantage of any single man, * * * or sett of men, who are a part only of that community * * *.

Pa. Const. declaration of rights §5 (1776); *accord*, Del. declaration of rights §§1, 5 (1776); Md. Const. declaration of rights §4 (1776); Mass. Const. preamble, pt. I, art. 7 (1780); N.H. Const. pt. I, arts. 1, 8, 10 (1784); Vt. Const. ch. 1, §§5-7 (1777); Va. Const. bill of rights §3 (1776); U.S. Const. preamble (1789). Thence the precept emerges that *all* of the people are entitled to legal equality of opportunity to exercise a voice in the governmental process. For a representative, republican government cannot exist separate from the people, but "rests on the foundation of a belief in rule by the people—not some, but all the people." *United Public Workers v. Mitchell*, 330 U.S. 75, 114 (1947) (Black, J., dissenting).

Our system of popular sovereignty presupposes that governmental programs and policies will represent a consensus derived in some regular manner from the sometimes complementary, sometimes conflicting, interests of the people *taken as a whole*. It is the operation of this process, and this process only, which uniquely determines the *public* interest—that is, the process by which a free people, acting individually or in voluntary associations *none of which possesses monopolistic powers rivalling those of government itself*, seeks to secure through governmental action the kind of services the majority desires and the minority can accept. We might describe our system, then, as one of *pure procedural justice*: a system designed, not to advance particular substantive views favoring specially privileged interests, but rather to define a general procedure for making decisions in the common interest, reserving the question of the specific content of public policy to be settled by the unimpeded operation of the process itself. Cf. B. Barry, *Political Argument* ch. vi (1965). As Mr. Justice Harlan said, concurring in *Hunter v. Erickson*,

laws which define the structure of political institutions * * * are designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group in its struggle with its political opponents.

393 U.S. 385, 393 (1969).

Such a system can function, however, only if the basic rules do not themselves embody *or tolerate* any mechanism which arbitrarily favors one group over all others in the competition to acquire and exercise political influence. Of course, the actions of government affect different individuals, classes, and interests in different and unequal ways. But there is no rational or objective means to measure these differences, or to compensate for them by “weighting” the political voices of some differently from the voices of others. Therefore, our system of government irrebuttably presumes that access to the political process must be available to all on an equal basis.

And so this Court has held, time and again. *E.g.*, *Lubin v. Panish*, 415 U.S. 709 (1974); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Harper v. Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964).

It is self-evident, we submit, that this principle of political equality for all citizens is, and must be, a true “absolute” of constitutional law—since to undermine it in any way simultaneously undermines the very legitimacy of government itself. And, for that reason, there could never be an occasion to depart from it, in order to enhance or to weaken the political position of any social group.

b. The agency-shop enhances the political power of public-employee unions at the expense of all other citizens.

The agency-shop in public employment creates conditions incompatible with the principle of political equality for all citizens. As we have demonstrated, public-sector labor relations are an inextricable part of the political process; and public-employee unions are among the most active and powerful political pressure-groups in the country, rivalling even the major political parties themselves. *Supra* pp. 62-80. *No one seriously denies this*. Indeed, union leaders themselves boldly declare their intentions to extend and exploit their power to its utmost limits. And by their unstinting efforts to have such laws enacted, they admit that the PERA agency-shop scheme is a key weapon in their struggle for political power. For, in conjunction with exclusive representation, the agency-shop allows unions to exercise a *quasi-governmental* authority over public employees. *See supra* pp. 150-53. And control over public employees carries with it the power to bring both politicians, and the general public, to their knees.

Our process of representative government is poorly prepared to meet the political challenge of unions empowered to compel

unwilling civil servants to contribute financial support to campaigns of political and ideological activism. The general public is, in political terms, a diffuse, unorganized agglomeration of individuals and groups—none of which possesses any power to coerce compliance with its demands from the others. Conversely, public-sector unions constitute compact, structured organizations with institutional continuity, political sophistication—and, above all else, the special privilege of compulsion provided by the agency-shop. Under these circumstances, public-sector unions may now possess means sufficient to overcome all other social forces contending for the attention of government, for control over the disposition of public resources, and for influence in the determination of public policy. *And no one seriously denies this, either.*

Professor Summers, for example, has pointed out that

[i]n the public sector employees already have, as citizens, a voice in decisionmaking through customary political channels. *The purpose of collective bargaining is to give them * * * a larger voice than the ordinary citizen.*

"Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156, 1193 (1974) (emphasis supplied). In his view,

[o]ne consequence of public employee bargaining is at least partial preclusion of public discussion of those subjects being bargained. And the effect of an agreement [between the union and the employer] is to foreclose any change in matters agreed upon during the term of the agreement.

Id. at 1192 (footnote omitted). On the basis of observations such as these, moreover, other careful observers have asked

*whether the attempt to institutionalize collective bargaining procedures in government would, in effect, remove the public from any decisional role in a policy area that has a direct bearing on the lives of citizens. * * ** Certainly, decisions pertaining to employee job interests, through their effects upon cost and services, are crucial to the public as well as to the employees. The problem can be expressed in the form of the following hypothesis: *the "professionalization" of collective bar-*

gaining will intensify the forces of bureaucracy and elitism in government, and result in a further erosion of the citizen's capacity to govern his affairs through access to the machinery of government on a basis of equality with other citizens.

Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 24 (1972) (emphasis supplied in part). And at least one federal court has upheld the discretion of a state legislature to ban all public-sector bargaining on the explicit theory that "sovereignty * * * signifies the right of the people of a state to govern themselves under the form of government of their choosing" and that "the prospect of public employee collective bargaining impinges upon those rights." *Winston-Salem/Forsyth County Unit, Educators' Association v. Phillips*, 381 F.Supp. 644, 648 n.4 (M.D.N.C. 1974) (three-judge court).

Given the unalterably political nature of public-sector collective bargaining itself (as recognized in statements such as the foregoing), and the potential for partisan political activism of public-employee unions (as judicially noticed by the Michigan Court of Appeals), we are entitled to wonder whether our political system and the politicians who administer it can adequately cope with the dangers the situation presents. Popular sovereignty ultimately rests upon the responsiveness of public officials to the demands of individuals and the voluntary associations which they form in order to advance their political and social interests. But it is a notorious fact of American political life that running for popular office is an expensive proposition, which leads politicians increasingly to seek the support of well-financed pressure groups, especially those with large voting constituencies. In the framework of these considerations it is easy to detect a deleterious effect on popular sovereignty from the near-universal unionization of public employees which schemes such as the PERA agency-shop promote.

We should have to scorn reality in order to believe that

public officials will resolutely defend the interests of unorganized taxpayers when confronted with the demands of public-employee unions which command both sizable financial resources and a politically disciplined *bloc* of votes. "Those in power," commented Mr. Justice Stewart, "whatever their politics, want only to perpetuate it." *Branzburg v. Hayes*, 408 U.S. 665, 724-25 (1972) (dissenting opinion). And successful public-sector unions have learned how to "intertwin[e] themselves with their nominal employer through patronage-political support arrangements." Burton & Krider, "The Role and Consequences of Strikes by Public Employees", 79 *Yale L.J.* 418, 432 (1970). Indeed, this "intertwining" has become such a commonplace that it has already been given a name: the "Hanslowe Effect", after Professor K. L. Hanslowe of Cornell, who first brought scholarly attention to the potential inherent in laws coercing union membership

of becoming a neat mutual back scratching mechanism, whereby public employee representatives and politicians reinforce the other's interest and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions and his tax rate and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.

The Emerging Law of Labor Relations in Public Employment 115 (1967).

In the private sector, the "Hanslowe Effect" appears in the form of the "sweetheart" contract. But it is hardly as insidious and dangerous there as it is in government employment. In the private sector, market forces of supply and demand, and the ever-present necessity to make a profit, all insure that most employers will resist unreasonable union demands in collective bargaining. Thus, the union generally remains on one side of the bargaining table, and the employer on the other. In the public sector, conversely, the political

nature of collective bargaining, the political aspirations of public officials, and the political activism of public-sector unions all conspire to establish a curiously inverted condition. With politicians actually or potentially beholden to unions for political support, the unions come in fact to occupy the advantageous position that private employers appeared to possess before the law prohibited company support of employee representatives. That is, the unions in effect sit on *both* sides of the bargaining table. Moreover, since there is no necessity that public services show a profit, the resistance of public officials to union political pressures is even further reduced. The lack of effective market checks, in addition to the "Hanslowe Effect", thus makes the danger from union political strength a critical, and perhaps fatal, threat to control of elected and appointed public officials by the taxpaying public.

We submit, therefore, that there is a substantial rational basis in the argument that, the more schemes such as the PERA agency-shop increase the financial receipts of, and coerce nonunion employees to seek membership in, militant public-sector labor organizations such as the appellee Union, the more such unions will be able to exchange dollars and votes for special political influence at the expense of society in general. And we submit that *such a logical and documented potential for abuse in and of itself creates a compelling public interest in disallowing the agency-shop in public employment*. After all, if (as this Court has said) "the integrity of our system of representative democracy is undermined" "[t]o the extent that large contributions are given to secure political quid pro quos from current and potential office holders", then what even more adverse effect on popular sovereignty must be occasioned by a scheme which compels innocent public employees, as a condition of the privilege to serve society as teachers, to finance the activities of organizations uniquely situated, qualified, and motivated to pervert the political process? *Buckley v. Valeo*, ____ U.S. ____, ____, 96 S.Ct. 612, 638-39 (1976).

c. In the Hatch-Act cases, this Court held that there is an overriding public interest in denying public employees the privilege to engage in political activities inimical to the good order and proper functioning of government.

We believe that this Court has already decided, in principle, that a compelling public interest exists in disallowing the PERA agency-shop scheme. "[T]he judgment of history", the Court observed in the *Letter Carriers* decision is

that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited.

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548, 557 (1973) (emphasis supplied); accord, *Broadrick v. Oklahoma*, 413 U.S. 601, 606-07 (1973) (state employees). For that reason, it rejected a constitutional challenge brought under the First Amendment against provisions of the Hatch Act which ban partisan political activities by employees of the federal government. Four reasons were advanced for its decision:

*[Government employees] should administer the law in accordance with the will of [the legislature], rather than in accordance with their own will or the will of a political party. * * **

* * * * *

[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

* * * * *

*[T]he rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. * * * [S]ubstantial barriers should be reised against * * * using the thousands*

or hundreds of thousands of [government] employees, paid for at public expense, to man [a party's] political structure and political campaigns.

* * * * *

*[E]mployment and advancement in the Government service [should] not depend on political performance, and * * * Government employees [sh]ould be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out of their own beliefs.*

413 U.S. at 564-66 (emphasis supplied throughout).

In essence, *Letter Carriers* teaches that the First Amendment simply does not extend a privilege to public employees, individually or in an association, to engage in partisan political activism which is itself incompatible with the impartiality, efficiency, and good order of the public service, or which perverts that service into a tool for improperly influencing the electoral process. And therefore, as long as the governmental regulations proscribing such activism are not substantially overbroad, they raise no constitutional issue, since no constitutional "right" exists to engage in the proscribed conduct. See *Letter Carriers*, 413 U.S. at 575-81; *Broadrick*, 413 U.S. at 607-18.

Of particular significance here is the footnote in which the Court recounted allegations that the Hatch Act impermissibly burdens the political activism of members and officers of public-employee unions:

The Union alleged that its members were desirous of
 "a. Running in local elections for such offices as school board member, city council member or mayor.
 "b. Writing letters on political subjects to newspapers.
 "c. Participating as a delegate in a political convention and running for office in a political party."

* * * * *

Plaintiff Mandicino alleged that as an active member and officer of plaintiff Union he "was compelled to

engage in political activities prohibited by . . . the Hatch Act in order to carry out the responsibilities of his offices," and that he had engaged in those "activities including house-to-house campaigning for candidates of political parties, participation as a delegate in conventions of a political party, active participation in the affairs of a political party, and fund raising on behalf of political parties and candidates."

413 U.S. at 551 n.3 (emphasis supplied). In the context of the Court's decision, this reference clearly indicates that extirpating partisan political pressure on the public service is so paramount a value that it removes from First-Amendment protection even those political activities which may be inherent in and necessary to the operations of public-employee labor unions.

We believe that *Letter Carriers* thus provides convincing support for the following proposition: *If the public interest in the politically impartial administration of government service is so substantial as to remove from the First Amendment certain union political activities which would otherwise be entitled to constitutional protection, then there is a compelling public interest in disallowing any statutory scheme which authorizes unions to exercise extraordinary political influence over that service.* And if this proposition is correct, then it necessarily implies the further conclusion that there is a compelling public interest in disallowing all forms of compulsory public-sector unionism, such as the agency-shop, which operate to enhance the power of unions to compel political and ideological conformity among public employees.

Reference to the four considerations detailed in *Letter Carriers* supports this conclusion. First, when public-sector unions exercise extraordinary political control over civil servants, they can mold public policy "in accordance with their own will" and not in accordance with the will of the community as expressed through the constitutional political process. Secondly, to the extent that the public perceives the extraordinary political influence public-sector unions enjoy

and exercise, "confidence in the system of representative Government is * * * eroded to a disastrous extent." That this has long been the situation, especially in urban areas, needs no emphasis here. See, e.g., Editorial: "The Governor's Legacy". *The New York Times*, Feb. 12, 1968, at 38, col. 1. Thirdly, through its compulsion to membership and the derivative effect of transferring employee-loyalties from public employers to unions, the agency-shop enables union leaders to employ "the rapidly expanding Government work force * * * to build a powerful, invincible, and perhaps corrupt political machine." It is notorious, after all, that the heart of union political strength lies not in direct financial contributions to candidates but in the provision of campaign-related services by union officials and members. See, e.g., H. Alexander, *Financing the 1968 Election* 194 (1971). And it is equally obvious that public-sector unions are uniquely situated and motivated to use "the thousands or hundreds of thousands of [government] employees, paid at public expense, to man [a party's] political structure and political campaigns." This to be sure, is "public financing" with a vengeance. Finally, the agency-shop in essence makes employment in the government service "depend on political performance"—since its necessary effect is to compel full union-membership, and thereby to subject employees to constant pressure to conform and curry favor with union officials, "rather than to act out of their own beliefs." Cf. 413 U.S. at 564-66.

In short, by every indicium recognized in the *Letter Carriers* case, there is a compelling public interest in prohibiting the PERA agency-shop scheme outright. *A fortiori*, then, there cannot be a substantial state interest in imposing that scheme at the cost of the Teachers' associational and political autonomy.

It is fitting at this point to advert briefly to an important distinction between the situation presented in this case, and that which underlay *Lathrop v. Donohue*, 367 U.S. 820

(1961). As we have noted, the Court in *Lathrop* split four ways over the constitutionality of applying lawyers' dues to the allegedly political activities of the integrated bar. See *supra* pp. 51-56. *Lathrop*, therefore, is no binding precedent for, or against, the Teachers. But it is instructive, none the less. *Lathrop* involved alleged political activities of an agency of the state judiciary, which activities were conceded to be in aid of the legislative process and of the regulation of the legal profession in the public interest. See *supra* pp. 55-56. In this case, conversely, the political activities of the Union are in aid of subversion of the legislative and administrative process for the private benefit of the Union's members. If, therefore, the several opinions in *Lathrop* correctly perceived serious constitutional questions in the integrated bar, then *a fortiori* such questions arise as to the agency-shop. For the integrated bar on its face serves a valid state purpose wholly compatible with popular sovereignty; whereas, the agency-shop constitutes an important part of a process which poses a substantial threat to representative government.

4.

As an instrument for transferring the loyalties of public employees from their employer to the Union, the agency-shop is incompatible with governmental sovereignty.

Finally, and most importantly, we submit that there is a compelling public interest in disallowing the PERA agency-shop scheme because of its erosive effect on governmental sovereignty. We shall establish this contention as follows: (a) No one denies that governmental sovereignty—by which we mean the unchallenged, undivided, and supreme power to govern the community—is vital not only to the freedom of our society but also to its very existence in peace and order.

(b) By coercing public employees to transfer their loyalties from their employer to unions, the agency-shop undermines the ability of government to perform its most vital functions. (c) Once a public-employee union gains the special privilege to "tax" dissenting employees through the agency-shop, it can ensconce itself in a position of political strength sufficient to ignore or frustrate the existing bans on public-sector strikes, and thereby challenge governmental sovereignty through direct action.

a. The existence of a free and ordered society demands that government exercise undiluted sovereign power over all matters within its jurisdiction.

The prime lesson of Western political history since the Dark Ages is that people cannot be free and secure in their daily activities unless their government is endowed with supreme—sovereign—power within its appointed sphere of action. A collection of people lacking a sovereign government is not an ordered society, but a mere aggregate of individuals living in a condition best described as feudalistic or anarchic. Indeed, an institution cannot be a *government* in the logically proper sense of the term unless it has undivided and unchallenged power to perform the functions allocated to it by its constituents—whether those functions pertain to the military, the law courts, the police and fire departments, sanitation, transportation, or the public schools. In the American system this point is peculiarly obvious; for our theory of *limited* government presumes that the state should take on only those functions so vitally important to the community that their accomplishment cannot safely be left to the discretion of private parties.

This concept of sovereign government is an inextricable part of our political tradition, tracing its heritage to the fountainhead of American political science, John Locke.

According to Locke, sovereignty is *the* necessary bulwark, in logic and in practice, against the dissolution of society:

[W]hen either the Legislative is changed, or the Legislators act contrary to the end for which they were constituted; those who are guilty are *guilty of Rebellion*. For if any one by force takes away the establish'd Legislative of any society, and the Laws by them made pursuant to their trust, he thereby takes away the Umpirage, which everyone had consented to, for a peaceable decision of all their Controversies, and a bar to the state of War amongst them. They, who remove, or change the Legislative, take away this decisive power, which no Body can have, but by the appointment and consent of the People; and so destroying the Authority, which the People did, and no Body else can set up, and introducing a Power, which the People hath not authoriz'd, they actually *introduce a state of War*, which is that of Force without Authority: and thus by removing the Legislative establish'd by the Society (in whose decisions the People acquiesced and united, as to that of their own will), they untie the Knot, and expose the People anew to the state of War. * * *

* * * * *

[W]hoever, either Ruler or Subject, by force goes about to invade the Rights of * * * [the] People, and lays the foundation for *overturning* the Constitution and Frame of *any Just Government*, is guilty of the greatest Crime * * * a Man is capable of, being to answer for all those mischiefs of Blood, Rapine, and Desolation, which the breaking to pieces of Governments bring on a Country. And he who does it, is justly to be esteemed the common Enemy and Pest of Mankind; and is to be treated accordingly.

Second Treatise on Government §§227, 230 (P. Laslett ed. 1960). More recently, that keen observer of social institutions, Sir Henry Maine, emphasized that

the greatest [domestic duty of a nation is] that its government should compel obedience to the law, civil and criminal. The vulgar impression is, no doubt, that laws enforce themselves. * * * But the truth is * * * that it is always the State which causes laws to be obeyed. * * * If any government should be tempted to

neglect, even for a moment, its function of compelling obedience to law—if a Democracy, for example, were to allow a portion of the multitude of which it consists to set some law at defiance which it happens to dislike—it would be guilty of a crime which hardly any other virtue could redeem, and which century upon century might fail to repair.

Popular Government 63-64 (1885). In short, the business of government—indeed, the fundamental duty which defines and makes legitimate its very existence—is to see that no group of men, no matter its purpose, can successfully challenge the authority and power of society.

No *sovereign* government can long survive the introduction into society of competing private associations endowed with or claiming similar powers of compulsion and coercion. Indeed, when such associations have appeared or arisen, history has denoted their competition as *invasions* or *rebellions*—thereby recognizing that their very existence signified a struggle for sovereignty with the established order. Still less can any *sovereign* government long survive the internal dissipation of its power to rule when it delegates some portion of its authority to a competing private association, or when such an association, armed with special privileges of coercion, draws from the government to itself the loyalties of the very persons through whom that government must perform the tasks allocated it by society.

This analysis, we submit, adduces a self-evident proposition—the logic of which, as we shall now show, precludes any possibility that the agency-shop could be in the public interest.

b. The PERA agency-shop scheme is incompatible with governmental sovereignty.

As the Supreme Court of Missouri observed,

[u]nder our form of government, public office or employ-

ment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service involves the exercise of legislative powers * * * and any attempted delegation thereof is void. * * * If such powers cannot be delegated, they surely cannot be bargained away or contracted away, and certainly not by any administrative or executive officers who cannot have any legislative powers.

City of Springfield v. Clouse, 356 Mo. 1239, 1251, 206 S.W.2d 539, 545 (1947); accord, *Hagerman v. Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947). In essence, this opinion recognizes that *there is no private-sector analogy properly applicable to government which would sustain an extension of every practice accepted in private-sector collective bargaining to public-sector employment*. For public employees "occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose." *Norwalk Teachers Association v. Board of Education*, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951).

That the agency-shop is an anomalous anachorism in the public sector is a necessary consequence of the fundamental distinction between private and public action to which such decisions refer. The basic principle of action in the private sector is *agreement*—whereas, in the public sector it is *compulsion*. Compulsory collective-bargaining laws do not force private employers to bargain; what such laws do is to deny the employers their common-law privilege to choose their bargaining partners. They must bargain with majority unions, not individual employees. If there were no such laws, private employers would still have to bargain with their employees. They could not compel anyone to work for them. Still less could they "unilaterally" dictate the terms and conditions of employment, since these are rigorously determined for both employers and employees by supply-and-demand conditions in the relevant markets. See, e.g., L. von Mises, *Human Action* ch. xxi (3d rev. ed. 1966).

The case is different with government, society's monopolistic agency of compulsion. In contrast to private business, government legitimately forces *everyone* to work for it, through taxation or the draft. To be sure, government does not customarily draft public employees; *but it has the authority to do so should society's needs require it*. This is the essence of its *sovereign* power and authority. But if sovereignty means the *supreme and unchallengeable* power of compulsion, in questions of public employment as elsewhere, it would be absurd to suggest that government could permit its employees to come under the control or influence of another authority—at least *while remaining sovereign*.

Yet, as we have shown, that is precisely what happens under the PERA agency-shop scheme. As soon as a union is granted the status of an exclusive representative, employees begin to experience psychological and other pressures to place in it their primary loyalties. See *supra* pp. 151-52. The ultimate point in this transfer of loyalties is reached when, as here, the law also compels dissenting employees to finance the union through agency-shop payments. Such a law is an excellent measure from the point of view of union officials. However, its vice lies in the implicit assumption it makes—and communicates to the employees—that they owe the benefits of public employment, not to the government or the taxpayers, but to the union. When conflict arises between the people and their government, on the one side, and public employees and their union, on the other, to which side will the employees lend their support? Encouraged by exclusive representation and the agency-shop to consider *the union*—not the government, not the people—as *their* sovereign, they will tend to close ranks behind union leaders, in spite of anti-strike laws and the critical needs of the citizenry which they are employed and paid to serve. And so the newspapers report, day after day, in a never-ending catalogue of "labor unrest" in the public sector.

Here, then, is a classic example of the phenomenon of the

internal dissolution of sovereign government. Through the agency-shop, government voluntarily relinquishes part of the power to govern delegated to it by the sovereign people, and aids a set of private persons—union leaders—to establish an independent and competing center of sovereign authority.

[A]nd so destroying the Authority, which the People did, and no Body else can set up, and introducing a Power, which the People hath not authoriz'd, [the legislators] actually *introduce a state of War*, which is that of Force without Authority * * *.

J. Locke, *Second Treatise on Government* §227 (P. Laslett ed. 1960). And to this necessary consequence of the dissolution of governmental sovereignty, we now turn.

c. The agency-shop materially enhances the ability of public-sector unions to challenge governmental sovereignty through strikes and other forms of direct action.

As a practical matter, it is not possible to compel public-sector collective bargaining *and* prohibit public-sector strikes. Interpersonal cooperation can be carried on either by way of *agreement*, or by way of *command*. The way of agreement, implicit in the process of collective bargaining, implies a privilege in the parties *to refuse* to deal with each other except on mutually satisfactory terms. Therefore, if the method of agreement, collective or otherwise, is to replace the method of command in public employment, then it is necessary that the privilege indispensable to the method of agreement accompany the shift. Otherwise, it is all a sham. See, e.g., Kheel, "Strikes and Public Employment", 67 *Mich. L. Rev.* 931 (1969); Wollett, "The Coming Revolution in Public School Management", 67 *Mich. L. Rev.* 1017 (1969). And union leaders recognize this: "You can't have collective bargaining and take away the right to strike. It's a tragedy." Montana, "Striking Teachers, Welfare, Transit and Sanitation

Workers", 19 *Lab. L.J.* 273, 289 (1968) (quoting Victor Gotbaum, president of AFSCME District 37, objecting to the strike-ban in New York's "Taylor Law").

Once endowed with the power to command employee loyalty, public-sector union leaders are not likely to remain passive victims of this "tragedy", as contemporary events demonstrate. This, however, creates another dilemma. For if collective bargaining without a privilege to strike is a sham, any government whose employees may strike is less than a sham. Even commentators not unfriendly to collective bargaining emphasize that "the major, long-run social cost of strikes in public employment" is "a distortion of the political process"—because public-sector strikes are a "political force" which "radically alter[s]" our system of government by transferring "a disproportionate share of effective power in the process of decision" to union officials. Wellington & Winter, "Structuring Collective Bargaining in Public Employment", 79 *Yale L.J.* 805, 822 (1970); Boynton, "Industrial Collective Bargaining in the Public Sector: Because It's There?", 21 *Catholic L. Rev.* 568, 576 (1972); Wellington & Winter, "The Limits of Collective Bargaining in Public Employment", 78 *Yale L.J.* 1107, 1123-24 (1969).

The state courts have defined the problem even more clearly. The vast majority of decisions recognizes that strikes to enforce the demands of public-employee unions are in direct contravention of the principle that government must serve *all* the people, not specially favored groups; that they contravene the duty inherent in public employment to refrain from conduct which interferes with the efficiency and good order of government; and that, ultimately, they constitute an attempt to coerce a delegation to union leaders of the discretion which government alone must exercise in the fulfillment of its duties. E.g., *Norwalk Teachers' Association v. Board of Education*, 138 Conn. 269, 273, 276, 83 A.2d 482, 484, 485 (1951); *Board of Education v. Redding*, 32 Ill.2d 567, 572, 207 N.E.2d 427, 430 (1965); *City of*

Cleveland v. Motor Coach Employees, Division 268, 90 N.E.2d 711, 714 (Ohio C.P. 1949); *City of Pawtucket v. Teachers, Local 930*, 87 R.I. 364, 371, 373, 141 A.2d 624, 628, 629 (1958). The state courts have repeatedly warned that, should unions acquire the power to strike at will and without public resistance, the necessary consequence would be the destruction of the democratic legislative process—and, therefore, that to permit unions to halt or check the functions of government unless their demands are met would be to transfer to them all legislative, executive, and judicial power. Since this would be to sanction “rebellion against government” and to provide efficacious “means of destroying government”, “[n]othing would be more ridiculous”. *City of New York v. De Lury*, 23 N.Y.2d 175, 183, 295 N.Y.S.2d 901, 906, 243 N.E.2d 128, 132 (1968), *appeal dismissed*, 394 U.S. 455 (1969); *Railway Mail Association v. Murphy*, 180 Misc. 868, 875, 44 N.Y.S.2d 601, 607 (Sup. Ct. 1943); *Motor Coach Employees, Division 268*, 90 N.E.2d at 715.

But enacting laws to prohibit public-sector strikes is one thing, and making them work something else again. Despite their illegality in almost all of the states, public-sector strikes have increased by over one thousand *per cent* during the last decade. See Table I, *supra* p. 123. At least one reason for this is obvious: namely, *the increasing power of public-employee unions*, to which Michigan has substantially added through the PERA agency-shop scheme.

Unions are primarily devices for concerting and concentrating otherwise diffuse employee-pressures against resisting employers, private or governmental. Their major purpose is to direct such pressures into channels and tactics which will seriously embarrass the operation of the employment unit in question, private or governmental, by doing the maximum possible harm to the segment of the community, consumers or taxpayers, served by the employer. The notion of a “spontaneous” *concerted* work-stoppage is a contradiction in terms. Planning and focusing are almost always the prerequi-

site to a *concerted* stoppage of work. And unions are agencies *specialized for this function*. It is their fundamental, if not exclusive, reason for being. Indeed, they may without prejudice or overstatement be called professional strike agencies—agencies which have acquired expertise in the timing and management of strikes, to the end of maximizing their effectiveness.

There is little reason, therefore, for assuming that once public-sector unions have acquired a potential power to strike they will not exercise that power whenever they meet resistance to their vital demands. See, e.g., Smith, “State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis”, 67 *Mich. L. Rev.* 891, 917 (1969) (predicting increases in public-sector strikes “as the areas of organization and collective bargaining * * * expand”). For unions must do everything expected of them when employers resist the demands to which union leaders have induced their members to believe themselves entitled. They must perform the strike-function when all else fails. Otherwise, their very reason for being disappears.

If this is true, however, what possible justification can there be for *strengthening* the already considerable and demonstrated ability of public-sector unions to engage in disruptive activities? What possible public interest can be served by a scheme such as the PERA agency-shop—which increases the unions’ treasuries, encourages employees to transfer their loyalties to the unions, and even coerces full union-membership? What compelling, or even legitimate, reason can be advanced for a scheme that helps to subsidize strikes, to subvert employer-employee solidarity, and to subject more and more public employees to the unions’ internal rules and discipline? How can *this* result be compatible with governmental sovereignty in the long term? We submit that it cannot—and therefore, that the PERA agency-shop scheme is repugnant on its face to the compelling public interest in the uninterrupted provision of governmental services.

Even union leaders do not dare to claim that their organizations' anti-social strike-threat activities should be subsidized from general state revenues. For if they presented such a straight-forward demand, they would be called upon at once to identify the public interest behind a scheme that taxed society to support the subversion of its most important institution; and they know that no such interest exists. *Cf. Coppage v. Kansas*, 236 U.S. 1, 16-17 (1915). Instead, they have employed the indirect means of the PERA agency-shop to achieve what is foreclosed to them by a direct approach. But the financial result is the same: the unions' treasuries swell by the identical amounts, whether Michigan selectively "taxes" dissenting employees, or promiscuously burdens society in general. And the agency-shop provides the added benefit of compelling organizational membership, and thereby increasing the *quantum* of direct control which union leaders can exercise over public employees. What it does *not* provide is the *visibility* which a system of direct subsidies would have. It hides from the public what is actually going on, in the jargon of "service fees", "free riders", and the like—the "newspeak" idioms for the process of extortion through which *true* public servants, whose loyalties remain with their employer and the taxpayers, are "shaken down" for the funds that union leaders then divert into activities antagonistic to the public interest.

In sum, we have established in this part of the brief that the PERA agency-shop scheme is repugnant *per se* to the First and Fourteenth Amendments; that the Michigan Court of Appeals has already held that it cannot satisfy the "balancing test" because of overbreadth; and that, in addition, it represents an excessive and unnecessary extension of the exclusive-representation device which threatens at least three compelling public interests. These showings conclude our positive constitutional case—a case, we believe, which is beyond refutation.

In Parts III. and IV., *infra*, we turn to an examination of the series of errors through which the Michigan Court of Appeals concluded otherwise.

III.

The equivocal treatment of *Hanson* by the court below served only to confuse the issues. To the limited extent that *Hanson*, a private-sector case, is at all relevant here, it is suggestive authority in favor of the Teachers because it broadly intimated that forcing even private-sector employees financially to support political activities to which they were opposed would be unconstitutional.

The main authority cited by the court below in refusing to invalidate the agency-shop provision of the Michigan PERA outright was this Court's decision in *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). While thus referring in a curious way (*cf.* pp. 195-99 *infra*) to *Hanson*, a private-sector case, the court below made no reference to the long line of public-sector-employment cases, pre-dating and post-dating *Hanson*, in which this Court developed the unconstitutional-conditions principle which we have reviewed *supra* pp. 21-40, and which we believe to be controlling here. This preference for the irrelevant over the relevant precedents cannot be attributed to any delinquency on the part of the Teachers' counsel, who have persistently urged before the courts below, as they have done here, that the unconstitutional-conditions principle is dispositive of the present case.

It is true that *Hanson* held (although on an analysis since superseded by decisions of this Court) that there was nothing unconstitutional in Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), which authorizes railroad employers to make collective agreements requiring all employees in a given bargaining unit to pay dues and fees to the exclusive-bargaining representative of the unit as a condition of employment.

On the cursory look which the Michigan courts have given it, perhaps *Hanson* would seem to dispose of the present case, in favor of the appellees. However, as we repeatedly contended below, First-Amendment challenges to state-action may not properly be rejected upon cursory inspection. We argued there, as we do here, that:

A. *Hanson* was as a molehill is to a mountain when compared to the largely subsequent development of the unconstitutional-conditions principle.

B. In any event, *Hanson* is distinguishable in that it dealt only with private-sector employment, not public-sector employment, and that in confining itself to the private sector it did no more than confirm the ancient common-law privilege of private employers to condition employment on either membership or nonmembership in a labor organization.

C. Indeed, *Hanson* would have to be regarded as implicit authority for the Teachers—if held relevant to this case at all—inasmuch as it broadly suggested that serious First-Amendment questions would be raised by a statute which permitted a *private* employer to impose the agency-shop in favor of a union—if in the same statute there were no limit on the authority of the union to use dues and fees derived from the agency-shop to finance political and ideological programs.

Here, not only do we deal with public employment, in contrast to the private employment involved in *Hanson*; but we are confronted with a statute which has been authoritatively construed as permitting unions to use forced agency-shop contributions to finance their political and ideological activities (A. 101)—the very kind of authorization which the Court in *Hanson* said would raise grave constitutional issues not then before it. 351 U.S. at 235, 238.

Finally, in a thorough misreading and misapplication of the cases succeeding *Hanson*—i.e., *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963)—the court below reasoned from them that the Teachers had no standing to sue and that the relief they sought had been precluded by those cases. We show *infra* pp. 200-05 that *Street* and *Allen* simply have nothing to do with this case; that, being confined to the private sector and its categorically different constitutional status, and dealing with a statute prohibiting use of compelled dues for political purposes, those cases are devoid of any significance whatsoever as precedents *here*.

A.

Hanson would be incompatible with the unconstitutional-conditions principle if applied to public employment, and should therefore either be distinguished from this case, overruled, or held superseded by subsequent constitutional development.

Hanson reversed a Nebraska Supreme Court ruling to the effect that §2, Eleventh of the Railway Labor Act was unconstitutional. It rested this reversal in part on the premise that “the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments.” 351 U.S. at 238. While recognizing these facts about the case, we shall demonstrate that *Hanson* is neither dispositive nor even applicable here.

We show *infra* pp. 191-99 that, as a private-sector case expressly warning of a serious constitutional question should it appear that the Railway Labor Act authorized unions to use forced contributions to finance their political activities, *Hanson* is both significantly distinct from this case and at least suggestive authority for the Teachers. At this point we bring to the Court’s attention how dramatically the approach taken in *Hanson* differed from the approach the Court was beginning to take in the unconstitutional-conditions cases which preceded *Hanson*—e.g., *Wieman v. Updegraff*, 344 U.S. 183 (1952)—and which it consummated in those which came later—e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

These and other similar cases have required, where state-action *prima facie* infringes First- and Fourteenth-Amendment freedoms, the most convincing proof of the

necessity of such infringement, even where merely incidental to the achievement of a "paramount" or "compelling" state interest. *Supra* pp. 115-20. The Court in *Hanson* imposed no such requirement; indeed, it dealt sketchily with all constitutional issues.³⁷ This is undoubtedly why Justice Douglas, the author of the *Hanson* opinion, came in a few years to look upon it with disfavor, if not distaste. He said of it:

I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.

Lathrop v. Donohue, 367 U.S. 820, 884 (1961) (dissenting opinion) (footnote omitted).

If the Court were to conclude here that *Hanson* is not significantly distinguishable from the present case, and that it is authority in favor of the constitutionality of the Michigan

³⁷*Compare* 351 U.S. at 233-37, and the brief constitutional analysis scattered over the relatively few lines of text on those pages, with the Court's insistence upon an exhaustive demonstration of a compelling state interest in such cases as *Keyishian*, *Pickering*, *Robel*, and *Sindermann*, to say nothing of the many other cases which we consider *supra* pp. 115-20. As a matter of fact, the Court in *Hanson* applied only the "rational-basis" test — and that in the briefest of forms. It said: "Congress, acting within its constitutional powers, has the final say on policy issues. *** The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises." 351 U.S. at 234. If Mr. Justice Brennan, dissenting, had reasonable grounds for deploring as "minimal" the Court's review of the justification for a challenged employment-application form in *Washington v. Davis*, 44 U.S.L.W. 4789, 4799 (U.S. Jun. 7, 1976), he would have to call the Court's review in *Hanson* at the very most "sub-minimal". Though confronted with a First-Amendment challenge in *Hanson*, the Court required no showing of a compelling or paramount state interest and inquired not at all into the question — which was to become so critical in subsequent First-Amendment Cases — whether the invasion of individual rights was confined as closely as possible to the least-restrictive means.

PERA, it would be confronted with a hard choice. It would have to choose between overruling *Hanson* or virtually abandoning the unconstitutional-conditions principle. For if this Court were to hold that Michigan may condition its public employment on a surrender by state employees of their First- and Fourteenth-Amendment freedoms of speech, association, and political autonomy, without at least demonstrating a compelling state interest, it is very hard to see what would be left of the unconstitutional-conditions doctrine.

However, we do not believe that there is any need to overrule *Hanson* or even to abandon it to rust away on the narrow-gauge constitutional sidetrack where it sits. What must be understood here is how categorically distinct the facts in *Hanson* were from those of this case. Once this is seen we shall also see why *Hanson* was disposed of on the basis of what would now be considered an inadequate constitutional standard.

B.

***Hanson* need not be overruled since it may be distinguished as a pre-emption case which merely confirmed the common-law privilege of private employers to condition employment at will.**

Hanson is categorically distinct from this case on both the facts and the relevant law. Despite the Teachers' best efforts to bring home these distinctions to the courts below, those courts have persisted in blindly clinging to the false theory that *Hanson*, in some vague way, relates to this case notwithstanding the controlling differences between the two in both fact and law.

In the first place, *Hanson* was a private-sector case. The employing railroad was a private company, its employees were private employees, and the union was a private association. Starting with Part I.A. of this brief, we have shown that there

is a fundamental difference between the constitutional and legal rules applicable to private employers and those applicable to public employers, an especially pronounced difference since the development of the unconstitutional-conditions principle. We have seen that at common law employers are privileged—in the absence of statutes or exceptional common-law rules to the contrary—to condition their offers of employment on either membership or nonmembership in a labor organization. *Supra* pp. 10-15 and cited authorities.

We have also demonstrated, as Mr. Justice Stewart observed in *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961), that the “state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer.” *Supra* pp. 15-17. And we have described at considerable length how it came about, as a result of such limitations on the authority of public employers, that they may not condition public employment on a waiver or surrender of First- and Fourteenth-Amendment liberties. *Supra* pp. 21-34.

Since the constitutional and legal rules applicable to public employers are radically different from those applicable to private employers, and since *Hanson* dealt exclusively with private-sector employment, *there is no conceivable way in which it could have passed upon the issues involved in this public-sector employment case.*

Let us review what was done in *Hanson* in the light of these elemental considerations. *Hanson* held (with an important reservation which we consider *infra* pp. 195-99) that Congress could permit private employers to require their employees in appropriate bargaining units to provide financial support to the exclusive-bargaining representatives of those units. “The union shop provision of the Railway Labor Act is only permissive”, Justice Douglas pointed out. “Congress has not compelled nor required carriers and employees to enter into union shop agreements.” 351 U.S. at 231.

From this merely permissive legislation, Justice Douglas inferred that there was enough “governmental action” in the case to justify at least a meagre constitutional inquiry. *See id.* at 231-32. It is interesting and instructive to pursue the “state-action” hypothesis of *Hanson*, even if only briefly. For example, we may ask how Congress could possibly have created a constitutional question by merely allowing employers and unions to negotiate a union-shop contract vastly more limited than they had every right to negotiate at common law. We know that as a general rule employers and unions were privileged at common law to negotiate even full closed shops. That being true, there would seem to be no constitutional infirmity in Congress’ merely permitting the parties to do what they had a common-law privilege to do. Indeed, if there were any valid ground for constitutional complaint in *Hanson* on “state-action” theory, it would seem to belong to the union and the employer, since *their* common-law and constitutional contract rights were limited to the negotiation of a narrow type of agency-shop in contrast to the unlimited types of compulsory-unionism agreements, including the full closed shop, generally allowed at common law.

When pressed in this manner, *Hanson* displays a rather unfortunate porousness. But we are required to bring home these characteristics in order to emphasize that *Hanson* was strictly a private-sector case, and as such totally inapplicable here. It is only marginally admissible even into the more amorphous category of “state-involvement” cases. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952). And even when so classified, it has nothing to say about the First-Amendment rights of public employees in a pure and true state-action case such as this. We may concede that “somewhere, somehow” there was state-action in *Hanson* sufficient to evoke a constitutional discussion. *Terry v.*

Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring). But that concession marks the utmost limit of *Hanson's* applicability here. *Hanson* said neither that public employment *could be* conditioned on a surrender of First-Amendment rights, nor that it could *not be*. It simply said nothing on the subject.

We respectfully submit that the most satisfactory way to classify *Hanson* is as a pre-emption case. While it is true, as we have already noted, that there was some First-Amendment discussion in the opinion, it must be remembered that there was also a question of the power of Congress to authorize the union-shop in a state such as Nebraska, where all forms of compulsory unionism are prohibited. 351 U.S. at 227-30. The first, and we believe the most significant, holding in *Hanson* was that under the Supremacy Clause the federal authorization of the agency-shop ousted any contrary state law:

As already noted, the 1951 amendment [of the Railway Labor Act], permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." §2, Eleventh. A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur [*sic*] of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State.

Id. at 232 (footnote omitted).

It is well to remember that *Hanson* was decided at a time when the Court was developing both the pre-emption and the unconstitutional-conditions doctrines. The Court had begun in 1953 to hold that the Taft-Hartley Act ousted even state laws which were substantively compatible with it, *Garner v. Teamsters, Local 776*, 346 U.S. 485; and in 1959 it culminated the process, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236. *Hanson* came between these cases, in 1956. With the pre-emption cases, *Hanson* has a definite, substantive relationship. With the unconstitutional-conditions cases it has none. *Cf. Hanson*, 351 U.S. at 238-39, 241-42

(Frankfurter, J., concurring). The U.S. Court of Appeals for the Eighth Circuit has had no trouble at all in seeing that *Hanson* is irrelevant to public-sector employment. *Knight v. Alsop*, No. 76-1051 (May 17, 1976). This Court should help the Michigan courts to achieve a similar level of enlightenment.

C.

***Hanson* is authority in favor of the Teachers insofar as it suggests that compelling even private-sector employees unwillingly to support a union's political and ideological activities would invade their rights under the First Amendment; and despite its apparent holding to the contrary, the Michigan Court of Appeals agreed with this contention.**

The opinion of the court below is a study in double-talk and evasion. It relies upon *Hanson* and it distinguishes *Hanson*. It declares that the Michigan PERA "could" violate the Teachers' rights but that somehow it does not. It disposes of their case, finally, on a meretricious procedural point drawn from *Hanson's* successors—*Street*, 367 U.S. 740, and *Allen*, 373 U.S. 113—two cases which have even less to do with this one than *Hanson* has; for *Street* and *Allen* were not constitutional decisions at all. *See infra* pp. 200-05.

Observe, for example, how the Michigan Court of Appeals begins its discussion of the relationship between *Hanson* and the present case:

In *Railway Employees' Department v. Hanson* * * *, the Supreme Court considered the question whether a union shop agreement forces workers into ideological [*sic*] and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights.

(A. 100).

But Hanson did not consider this question. On the contrary, every member of this Court who commented upon *Hanson* carefully noted that the issue was reserved. Thus in the main opinion in *Hanson* itself, written by Justice Douglas, we find this language:

It is argued that compulsory membership will be used to impair freedom of expression. *But that problem is not presented by this record.* Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, or assessments." If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.

351 U.S. at 238 (emphasis supplied). Again, Justice Frankfurter, concurring in *Hanson*, 351 U.S. at 242, emphasized that

The Court has put to one side situations not now before us for which the protection of the First Amendment was earnestly urged at the Bar. I, too, leave them to one side.

And still again, Mr. Justice Brennan, in *Street*, 367 U.S. at 749, similarly noted the narrowness of the issue decided in *Hanson*:

[A]ll that was held in *Hanson* was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give "financial support" to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which "all employees shall become members of the labor organization representing their craft or class." Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.

We have already noted that Justice Douglas came to repent *Hanson* and urged that it be confined narrowly to its facts, a way of saying that it should be given no value as a precedent. *Supra* p. 190. We do not here intend to use *Hanson* as a precedent and respectfully suggest that the Court not allow the appellees to do so, either; for as to them it is worthless. However, we should be remiss if we failed to observe that the Court was extremely uneasy, and that Justice Black was positively up in arms, in *Street* over the possibility that *Hanson* might come to stand for the proposition that the agency-shop had passed muster under the First Amendment. See 367 U.S. at 786-87.

Only such extreme uneasiness could have produced the drastic amendment of § 2, Eleventh of the Railway Labor Act which we find in the opinion of the majority in *Street*—where the constitutional question left open in *Hanson* had to be confronted because the record there, in *Street*, replete as it was with evidence that the union involved engaged heavily in political and other ideological activities, left the Court no alternative. No alternative, that is, but one: to read into § 2, Eleventh a restriction which plainly had not been placed there by Congress. Compare *Street*, 367 U.S. at 746-50, with *id.* at 801-03 (Frankfurter & Harlan, JJ., dissenting). Purely in order to avoid the constitutional issue left open in *Hanson*, the majority in *Street* held, despite the statutory language to the contrary, that there was implicit in § 2, Eleventh a limitation on the uses to which unions might put compelled agency-shop contributions. *Id.* at 768-69. Justice Douglas's special concurrence in *Street*—a study in excruciating embarrassment if there ever was one³⁸—indicates how

³⁸ "[S]ince the funds here in issue are used for causes other than defraying the costs of collective bargaining, I would affirm the judgment below with modifications. Although I recognize the strength of the arguments advanced by my Brothers BLACK and WHITTAKER against giving a 'proportional' relief to appellees in this case, there is the practical problem of mustering five Justices for a judgment in this case. * * * So I have concluded *dubitante* to agree to the one suggested by MR. JUSTICE BRENNAN * * *." *Street*, 367 U.S. at 778-79 (Douglas, J., concurring).

nervous the majority was on the question of the constitutionality of the agency shop—even in the private sector.

Now, if the majority was so concerned over the validity of the agency-shop even in the private sector, where the unconstitutional-conditions principle is inapplicable, one may confidently suppose that compelled agency-shop contributions in the public sector would induce a much greater degree of uneasiness. And this uneasiness would be exacerbated by a public-sector agency-shop authorization, such as we have in this case, which the Michigan Court of Appeals itself construed as containing no limitations on the uses to which the Union might put the exacted dues and fees (A. 101).

After stating that *Hanson* had “considered” a constitutional issue which, as we have seen, this Court had explicitly reserved, the Michigan Court of Appeals remarkably proceeded to say that *Hanson* “did not consider” this issue (A. 100). Even more remarkably, the Michigan Court then declared that, since the Michigan PERA permits agency-shop dues and fees to be used for political and ideological purposes, the agency-shop clause as authorized by the PERA “could” violate the Teachers’ constitutional rights (A. 101-02).

We are never told what was meant by this “could.” For the Michigan court, in a blinding and indeed stupefying display of impermissible juridical and ratiocinative legerdemain, then held that since it read *Hanson*’s progeny—*Street* and *Allen*—as denying the kind of relief sought by the Teachers here, they were not entitled to any relief at all (A. 102-04).

There are so many errors in this final holding that a separate section is devoted to them. See *infra* pp. 199-205. Here we must conclude with perhaps the most remarkable fact of all: viz., that while giving the impression that it was relying on *Hanson* to rule against the Teachers, the Michigan Court of Appeals did not actually rely on *Hanson* at all, but distinguished it (A. 100); and that what appears to be a

decision *against* the Teachers is actually *for* them *on the constitutional merits* but against them—and only narrowly so—on an irrelevant, incompetent, and immaterial consideration of a pair of decisions which, as we shall show next, have nothing at all to do with this case.

We must not lose sight of the main burden of this section, however. We have demonstrated, we believe, that to the extent that it is relevant at all, this Court’s decision in *Hanson* is suggestive authority in favor of the Teachers.

IV.

The Teachers had standing to sue, and the injunctive relief they sought was in all respects appropriate.

There can be no doubt, after consulting the decisions of this Court in similar cases, that the Teachers had standing to sue and that the injunctive relief they prayed was not only *an* appropriate remedy but indeed the *only* remedy for the unconstitutional conduct here challenged. Once one has been compelled to fund repugnant political and ideological activities, the harm is done. The Teachers here, like all others who suffer restraint of their civil rights, can never be provided a genuinely adequate remedy at law. That is why, one may suppose, this Court has developed liberal standing rules and been generous with injunctive relief especially in First-Amendment cases. See *infra* pp. 206-14.

The Michigan Court of Appeals ignored this Court’s decisions on standing and injunctive relief in constitutional cases as steadfastly as it ignored the unconstitutional-conditions precedents. Presumably for lack of genuine authority for the conclusion it had determined to reach, the Michigan court made do with some fabricated authority. It cited and quoted in support of its rulings on standing and injunctive relief, this Court’s decision in *International Association of Machinists v.*

Street, 367 U.S. 740 (1961) (A. 102-04). However, we are compelled regretfully to point out that, besides being irrelevant here, since it was not a constitutional decision at all, *Street* happens also not to stand for the propositions for which the Michigan Court of Appeals cited it as authority.

A.

Street and *Allen*, the authorities relied upon below to deny the Teachers standing to sue and any right to injunctive relief, were statutory interpretations, not constitutional adjudications, and hence not controlling here; moreover, the court below misinterpreted those cases, holding them authority against the Teachers when actually they favor the Teachers' claims.

We have already described the erratic course which the Michigan Court of Appeals took with respect to the relevance of *Hanson* to this case: first suggesting that *Hanson* had upheld the constitutionality of the agency-shop generally, then conceding that *Hanson* had really not passed upon the issue presented here, and finally concluding with the climactically inconclusive remark that the PERA agency-shop authorization "could" violate the Teachers' constitutional rights (A. 102).

One might have expected the Michigan Court of Appeals at that point to have gone on to elaborate the circumstances which would give intelligible content to the vague and conditional expression, "could". Disappointing this expectation, the court below veered precipitately instead to the true but unrelated remark that "this is not a true class action" (A. 102-03). From there it slid to the inaccurate assertion that *Street* limited relief in such cases as this to only "those Detroit teachers who have specifically protested the use of

their funds for political purposes to which they object" (A. 103). And from *there* it moved in a crescendo of blended irrelevance and error to the incorrect conclusion that *Street* precluded the kind of injunctive relief which the Teachers seek.

I.

As statutory interpretations, Street and Allen could not have disposed of the Teachers' claims, either procedurally or substantively, because those claims are constitutional in character, as the court below itself held.

As we have already explained, *Street* was in no sense a constitutional decision. On the contrary, it narrowly limited §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), precisely in order to avoid the constitutional issue reserved in *Hanson*, 367 U.S. at 749-70. The court below, however, has conceded not only that the Teachers' claim is constitutional in character, but that it "could" be valid (A. 101-02). In such circumstances it should have gone without saying that the *Street* holdings on standing to sue and on the propriety of injunctive relief were of no relevance in this case; for hardly any proposition is clearer than that "non-constitutional standing doctrines must yield to the policy of prompt vindication of First Amendment rights." *National Student Association v. Hershey*, 412 F.2d 1103, 1119 n.46 (D.C. Cir. 1969), citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965). Quite clearly, the Michigan Court of Appeals erred in holding, with no attempt whatsoever at justification, that the standing rules attributed to *Street* were conclusive against the Teachers.

But the worst is yet to come. The court below did more than rely upon an irrelevant precedent. It also misread that precedent.

2.

Street and Allen both held that objections to the improper use of compelled dues were timely if made for the first time in the complaint.

The Michigan Court of Appeals denied the Teachers' petition in part because, citing *Street* as authority for this requirement, they "made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object" (A. 104). Anyone who takes the trouble to read *Street* with some diligence will see that it is not authority for any such requirement. As a matter of fact, *Street* expressly declared that registering objections for the first time in the complaint or in the subsequent proceedings would sufficiently ground the action:

The appellees who have participated in this action have *in the course of it* made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes.

367 U.S. at 771 (emphasis supplied). Mr. Justice Brennan, the author of the *Street* opinion, also wrote the Court's opinion in *Allen*, where he said:

Respondents [dissident employees] first made known their objection to the petitioners' [unions'] political expenditures in their complaint filed in this action; however, this was early enough. *Street*, 367 U.S., at 771.

373 U.S. at 113 n.6.

To its erroneous ruling regarding the timing of the protest which it saw as a prerequisite to standing in this case, the Court of Appeals put yet another inaccurate gloss on *Street*. It inexplicably proceeded to declare that in order to preserve his recognized First-Amendment rights a dissenting employee "must make known to the union those causes and candidates

to which he objects" (A. 104). Not only does one search the *Street* opinions in vain for such a requirement, but it is directly contrary to the holding of *Allen* that:

[i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union.

373 U.S. at 118.

There can be no doubt that the Teachers, notwithstanding the contrary holding of the Michigan Court of Appeals, met the *Street* and *Allen* requirements. The record is clear. In the complaint in which they all joined, they made objections easily as specific as those in *Allen* to the agency-shop, on the ground that the money it purported to exact from them was being used and would be used for political purposes of which they disapproved. (A. 12, 48-49.) Moreover, they made offers of proof in support of those charges (A. 21-28)—offers ignored in the courts below in their haste to dispose of the case by the judgment on the pleadings demanded by the appellees.

How the Michigan Court of Appeals could have affirmed that judgment in reliance upon *Street* is beyond understanding. Even if *Street*, a statutory decision, were fully determinative of the standing aspects of this constitutional case, the fact is that the Teachers satisfied its pleading and standing requirements, and those of *Allen* as well.

3.

Contrary to the holding below, infringements of First-Amendment rights are peculiarly subject to injunctive relief, and Street so implied.

The Michigan Court of Appeals said that in a case such as this "the Supreme Court made it clear in *Street* that injunctive relief is not the proper remedy" (A. 103). This too is a misreading of *Street*. More likely than not this mistake

was brought about by the Michigan court's reliance upon a quotation from *Street* which was separated from its proper context and thus conveyed a distorted conception of what the Court in *Street* really had said about the availability of injunctive relief. Perhaps if the Michigan court had read the whole of the relevant statement by this Court, it would have concluded that the comment had no applicability to a case such as this, where the complaint seeks injunctive relief against a prior restraint of First-Amendment activity; for such is its plain import:

[The dissident employees'] right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds.

367 U.S. at 771. This statement, which immediately precedes the one quoted out of context by the Michigan Court of Appeals, clearly recognizes that there is a significant difference between a case in which complaint is made against the uses to which validly extracted funds are put and one in which the complaint challenges the constitutionality of the extraction itself, as the Teachers do here (A. 13, 49-50). Only after this distinction was made did the Court go on to say, in the part quoted by the Michigan Court of Appeals (A. 103):

We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate *to the violation of the Act's restriction on expenditures*. Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.

367 U.S. at 740 (emphasis supplied).

There is no way in which the *complete* opinion in *Street* concerning the propriety of injunctive relief can properly be construed as militating against the Teachers here. Setting aside all other considerations for the moment, we must emphasize that the Teachers here have *not* asked for an injunction restraining the Union from spending voluntarily contributed funds in any way that the Union and its members wish: they have asked only that they be relieved of the prior restraint which enforcement of the agency-shop against them would impose upon their First-Amendment rights of free speech, free association, and political autonomy.³⁹

The whole of this Court's opinion on the injunction issue plainly indicates an awareness that while injunctive relief might be improper in the limited statutory circumstances involved in *Street*, a different conclusion as to the propriety of injunctive relief would be reached in a case in which a valid constitutional claim was made. Indeed, the Court that decided *Street* is the same one which has established the unconstitutional-conditions principle and implemented it in case after case with injunctive relief against abridgments of First-Amendment rights. *Cf. supra* pp. 21-34. In fact, it is a commonplace of constitutional law that nothing but injunctive relief can provide an adequate corrective to restraints of First-Amendment rights. *See infra* pp. 210-14. By definition, prior restraints upon speech, association, and political autonomy can be adequately dealt with in no other way if those basic rights are to be preserved.

³⁹The *Aboud* Teachers at all times have sought relief only on their own behalf, since they did not cast their complaint as a class action (A. 50-52). And the *Warczak* Teachers also sought relief on their own behalf as well as on behalf of a class of nonunion Detroit teachers (A. 13-15). Surely there is no rule of law, of procedure, or of common sense which declares that complaints must be dismissed as to named plaintiffs even if it is true, as the Michigan Court of Appeals stated, "that this is not a true class action" (A. 102). In both *Street*, 367 U.S. at 771-75, and *Allen*, 373 U.S. at 120-24, the case was remanded to the lower courts for the fashioning of relief for the plaintiffs, not for dismissal.

B.

Constitutional doctrine applied by this Court in the overbreadth and prior-restraint cases establishes the Teachers' standing to challenge the constitutionality of the agency-shop scheme.

The dismissal of the Teachers' attack upon the constitutionality of the agency-shop statute was affirmed by the Michigan Court of Appeals in part on the ground that they lacked standing to challenge the Union's use of compulsory fees for political activities (A. 104). But in order to reach this conclusion, the Michigan court had to ignore this Court's teaching on the standing of parties to challenge state-action which allegedly deters privileged First-Amendment activity. The relevant doctrine has been succinctly stated recently in a case brought by public employees attacking state-action which precluded them from joining a labor union and bargaining collectively:

It has become almost an axiom of law that the prospective chilling of First Amendment rights will give a party standing to challenge an allegedly invalid legislative enactment.

Vorbeck v. McNeal, 407 F. Supp. 733, 738 (E.D. Mo. 1976) (three-judge court), *aff'd mem.*, 44 U.S.L.W. 3737 (U.S. Jun. 21, 1976).

Neither the appellees nor the court below denied that the agency-shop statute and contract provision require the Teachers financially to support the Union or be discharged. All of the Teachers have alleged that they have refused to pay the required service fees and that the Board intends to discharge them for non-compliance with the contract provision (A. 11, 46, 48); the *Abood* Teachers have further alleged that they have in fact been threatened with discharge

for failure to pay the fees (A. 47).⁴⁰ Finally, the Teachers have alleged that the agency-shop infringes their First-Amendment freedoms because it requires them to subsidize unwillingly the Union's political and ideological activities as a condition of their employment (A. 12-14, 48-50). "This proceeding * * * meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint." *United Public Workers v. Mitchell*, 330 U.S. 75, 92 (1947); see *Cramp v. Board of Public Instruction*, 368 U.S. 278, 280-85 (1961).

The Michigan Court of Appeals recognized that the issue of "whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining * * * is squarely before us in the case at bar" (A. 100). This concession comes as no surprise in view of the allegations of the complaints just described and the Teachers' contentions on appeal that §10 of the PERA on its face abridges their First-Amendment freedoms because it sanctions the use of compelled service fees for political and ideological purposes (A. 80-83). Moreover, the appellees conceded before the Court of Appeals that the issue of "whether there is any constitutional infirmity in the agency shop clause in question *or in the Act authorizing it*" was "*squarely presented*" by the appeal (R., Brief of Defendants-Appellees at 5, Mich. Ct. App., Jul. 19, 1974) (emphasis supplied).

This, then, is a classic First-Amendment "overbreadth" case. The Teachers have alleged a present infringement of

⁴⁰The appellees will undoubtedly assert that many of the Teachers have voluntarily paid service fees. Anticipating this, we point out that under the duress of repeated threats of discharge from the Board and the Union, some of the Teachers have paid service fees *involuntarily* and *under protest* (R., Supplemental Memorandum in Opposition to the Federation's Suggestion of Partial Mootness at 4-9, and attached Affidavits, Mich. Ct. App., Sept. 17, 1974).

their freedoms not to associate and not to speak resulting from the operation of an overbroad statute (and state-agency "rule" promulgated under it), and have alleged the threatened penalties for its violation. Even more tellingly, the Court of Appeals *explicitly held* that the statute is overbroad in precisely the sense asserted by the Teachers: "[I]t is clear that the amendment sanctions the use of nonunion members' fees for purposes other than collective bargaining" (A 101). Misapplying the irrelevant "protest" requirement of *Street* and *Allen*, however, the Michigan court then ruled that the Teachers could not raise the very constitutional question it recognized as being before it.

The overbreadth-standing doctrine applied by this Court in case after case does not permit such a result. Even if the Michigan courts had presumed (in spite of the well-pleaded allegations of the complaints) that the Union makes no political expenditures from the Teachers' coerced fees, or that they do not object to any such expenditures actually made, the Teachers would still have had standing to challenge the constitutionality of the state's authorizing the use of coerced agency-shop fees for political and ideological activities. As Mr. Justice Brennan said for the Court in *NAACP v. Button*,

we will not presume that the statute curtails constitutionally protected activity as little as possible * * *. [T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights *whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.*

371 U.S. 415, 432 (1963) (emphasis supplied). Thus the Court has recognized that standing exists in First-Amendment cases even though the complainant has not demonstrated that he has personally suffered from an unconstitutional application of the challenged overbroad statute. *E.g., Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975) (speech and press);

Grayned v. City of Rockford, 408 U.S. 104, 114-15 (1972) (picketing); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (speech); *Coates v. City of Cincinnati*, 402 U.S. 611, 615-16 (association and assembly); see *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965).

Very recently, a unanimous Court invoked the overbreadth-standing doctrine to permit the operators of two "topless-dancing" bars, *against whom no criminal prosecution was pending*, to seek declaratory and injunctive relief against an ordinance which prohibited any female from appearing "topless" in any public place. The Court held that,

even though a statute or ordinance may be constitutionally applied to the activities of a particular [party], that [party] may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

Doran v. Salem Inn, Inc., 422 U.S. 922, ___, 95 S. Ct. 2561, 2568-69 (1975). And the overbreadth doctrine is applicable to cases challenging statutes the penalty for violation of which is dismissal from public employment, as well as to criminal statutes. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *Soglin v. Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969); cf. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) ("vagueness").⁴¹ Therefore, in the light of *Doran* and its predecessors, the Michigan Court of Appeals clearly erred in denying the Teachers protection against a statute which, it had already held, "could" violate their First- and Fourteenth-Amendment rights (A. 102).

Furthermore, we have already seen how the PERA agency-shop scheme works a prior restraint on the Teachers' First-Amendment freedoms. *Supra* pp. 87-93. The Court of Appeals has judicially "perfected" this scheme by holding that, in order to preserve their rights not to speak and not to associate, the Teachers must first notify the Union of their objections to the use of their compulsory fees for political

⁴¹"While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968).

candidates and cases § 104)—thus imposing on them the burden of applying for a “permit” to exercise their freedoms. Mr. Justice Stewart, speaking for the Court in *Shuttlesworth v. City of Birmingham*, has explained why this type of imposition cannot bar suit by one challenging a prior restraint:

[O]ur decisions have made it clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license. “The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.” *Jones v. Opelika*, 316 U.S. 584, 602 (Stone, C.J., dissenting), adopted *per curiam* on rehearing, 319 U.S. 103, 104.

394 U.S. 147, 151 (1969) (footnote omitted); accord, e.g., *Freedman v. Maryland*, 380 U.S. 51, 55-57 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938).

Finally, as was the case in *Staub*, the Michigan Court of Appeals’ holding that the Teachers lacked standing to attack the constitutionality of PERA §10 because they made no protest to the Union “is not an adequate nonfederal ground of decision.” 355 U.S. at 319. Therefore, as it did in *Staub*, the Court should proceed here to the merits of the Teachers’ claim that the agency-shop statute “is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent on the will of the [Union] and thereby constitutes a prior restraint upon, and abridges, that freedom.” *Id.* at 321.

C.

Injunctive relief is particularly appropriate to remedy the irreparable harm which the agency-shop scheme necessarily causes.

We have already seen that *Street* did not face the question of the propriety of injunctive relief in a case in which a valid First-Amendment claim is made against the constitutionality of the agency-shop itself. *Supra* pp. 203-05. Here, however, particularly if the Teachers are correct in their contention that public-sector collective bargaining is an inherently political process, it is appropriate to enjoin the Board and the Union from enforcing their agency-shop agreement against the Teachers.⁴² For the mere requirement of financial support of the Union imposed on the Teachers clearly and comprehensively violates essential First-Amendment rights.

This Court has recognized that state-action which deters the exercise of First-Amendment rights necessarily causes the kind of irreparable injury which justifies injunctive relief. *See Allee v. Medrano*, 416 U.S. 802, 814-15 (1974); *Dombrowski v. Pfister*, 380 U.S. 479, 483-89 (1965).⁴³

⁴²The *Abood* complaint specifically asked the Wayne County Circuit Court to enjoin the “Defendants from discharging Plaintiffs pursuant to the agency shop clause of the collective bargaining agreement” (A. 51); the *Warczak* complaint, brought before the effective date of the agency-shop clause, requested “such further and other relief as may be necessary, or may to the Court seem just and equitable” (A. 15).

⁴³The inferior federal courts have applied the same principle on numerous occasions in First-Amendment cases. *E.g.*, 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159-62 (2d Cir. 1974) (prior restraint); *Katz v. McAulay*, 438 F.2d 1058, 1060 n.3 (2d Cir. 1971) (*dictum*), cert. denied, 405 U.S. 933 (1972); *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969) (assembly and petition); *Keefe v. Geanakos*, 418 F.2d 359, 363 (1st Cir. 1969) (academic freedom); *Sheridan v. Garrison*, 415 F.2d 699, 705-06 (5th Cir. 1969) (speech), cert. denied, 396 U.S. 1040 (1970); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969) (press); *Wolff v. Selective Service Local*

(continued)

That this case involves a threatened discharge of public employees, rather than threatened criminal prosecutions as in *Allee* and *Dombrowski*, in no way diminishes the likelihood of irreparable injury to the Teacher's First-Amendment rights. On the contrary, the injury is less problematical:

In *Baggett* [v. *Bullitt*, 377 U.S. 360 (1964),] and similar cases we enjoined state officials from discharging employees who failed to take certain loyalty oaths. We held that the States were without power to exact the promises involved, with their vague and uncertain content concerning advocacy and political association, as a condition of employment. *Apart from the fact that any plaintiff discharged for exercising his constitutional right to refuse to take the oath would have had no adequate remedy at law, the relief sought was of course the kind that raises no special problem—an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution.*

(footnote continued from preceding page)

Bd., 372 F.2d 817, 822, 824 (2d Cir. 1967) (speech and assembly); *Locke v. Vance*, 307 F. Supp. 439, 444 (S.D. Tex. 1969) (three-judge court); see *Lewis v. Kugler*, 446 F.2d 1343, 1350 & n.12 (3d Cir. 1971) (search and seizure with First-Amendment implications); cf. *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (Fourteenth-Amendment equal protection); *Clemons v. Board of Educ.*, 228 F.2d 853, 857 (6th Cir.) (equal protection), *cert denied*, 350 U.S. 1006 (1956); *Wilson v. Board of Supervisors*, 92 F. Supp. 986, 989 (E.D. La. 1950) (three-judge court), *aff'd mem.*, 340 U.S. 909 (1951).

In *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974), a taxpayers' suit under the establishment clause of the First Amendment, the three-judge District Court held that "[t]he deprivation of such a fundamental Constitutional right constitutes irreparable harm", and granted a preliminary injunction. 358 F. Supp. at 43. "This Court's affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." *Meek v. Pittinger*, 421 U.S. 349, 367 n.16 (1975).

Younger v. Harris, 401 U.S. 37, 46 n.4 (1971) (emphasis supplied). See *Burns v. Elrod*, 409 F.2d 1133, 1136 (7th Cir. 1975), *cert. granted*, 423 U.S. 921 (1975).

These principles mandate injunctive relief for the Teachers even if PERA §10 is struck down solely on the ground of its overbreadth in authorizing the use of agency-fees for political and ideological purposes. For the *primary* harm caused by the expenditure of coerced fees upon political and ideological activism from which public employees dissent is not a mere temporary deprivation of money, curable by damages or "restitution"—the remedy preferred by the Michigan Court of Appeals (A.103-04). Rather it is the *irreparable* injury caused by the promulgation of ideas, the promotion of causes, the electioneering for candidates, the mobilization of legislative forces, and the purveying of other official influence to which the Union directs such expenditures. This use of the Teachers' money

damages them doubly. *Its utilization to support candidates and causes [they] oppose renders them captive to the ideas, associations and causes espoused by others.* At the same time it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970).

As this Court has repeatedly said, "[t]here are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation* * *." *Hague v. CIO*, 307 U.S. 496, 529 (1939) (Stone & Reed, JJ., separate opinion). Such is the case here. The harm done to the Teachers cannot be measured simply in terms of the coerced fees spent on the Union's political and ideological activism. And therefore, recovery of damages, or "restitution", would be no real remedy at all. For political and ideological viewpoints once promulgated, and political

influence once applied, cannot be withdrawn from the marketplace of ideas, the voting booth, the legislative chamber, or the negotiating process. A mere monetary judgment against the Union would not cure the *influence* which its use of the coerced fees may have had, for example, on an election. Indeed, it might not even deter the initial malfeasance in the future—since the Union might well consider the immediate and certain impact of expending the monies on partisan activism more valuable than the cost of “borrowing” the funds from the Teachers through the agency-shop scheme. See *Cort v. Ash*, 422 U.S. 66, 84 (1975).

For that reason, an injunction against enforcement of the agency-shop scheme is the *only* adequate remedy in this case. See *Cantwell v. Connecticut*, 310 U.S. 296, 305-06 (1940).

CONCLUSION

Either the decision below should be reversed and the PERA agency-shop declared unconstitutional on its face as an abridgment of the Teachers' freedoms of speech, association, and political autonomy; or the case should be remanded with a direction that the Teachers be given an opportunity to prove the invasion of their civil liberties that they have alleged.

The decision of the Michigan Court of Appeals is an affront to the Bill of Rights. The Michigan Supreme Court has not covered itself with glory, either, in refusing the Teachers an appeal although they have raised issues which cut directly to the center of the most profound constitutional challenges of our time: the threats posed simultaneously to personal freedom and to popular sovereignty by compulsory public-sector unionism.

Unlike some cases in which the Court has applied the unconstitutional-conditions principle, this is one where in defending individual liberty it can at the same time help safeguard also the basic principle of the American polity:

popular sovereignty. For in denying the Michigan officials constitutional authority to combine with the Union at the expense of the Teachers' civil liberties, the Court will check to some degree the potential of public-sector unionism for distorting, if not overwhelming, the normal processes of popular, representative, government.

Surely the Court did not fashion the unconstitutional-conditions principle for the benefit only of those persons who associate with others in challenging our form of government, or who prefer to attack truths long held, or who, as is their inalienable right, delight in treating American symbols and institutions with scorn. The Bill of Rights can not be that crabbed and cramped. There must be room in the generous mansion of the Constitution in which the liberties also of those who favor old American principles of individual autonomy and popular sovereignty may find quiet sanctuary.

We respectfully urge the Court to vacate the decision below and order entry of judgment for the Teachers. Reversing the Michigan Court of Appeals will bear out for the Teachers the promise held forth in the Bill of Rights. It will also serve the community. It will reassure the nation that the Constitution protects equally the civil rights of all Americans. It will demonstrate that the Members of this Court can be relied upon to find in the Constitution equal protection for both those who defend and those who attack basic American institutions.

If the Court does not deem it proper flatly to hold the agency-shop statute unconstitutional on its face, we respectfully request that it at least reverse and remand this case with directions that the Teachers be provided an opportunity to prove, as they have alleged, that their

liberties are being abridged to no valid public purpose. This much, we believe, is their right.

Respectfully submitted,

SYLVESTER PETRO
2841 Fairmont Road
Winston-Salem, N.C. 27106
Attorney for Appellants

July 10, 1976

Of Counsel:

JOHN L. KILCULLEN

Kilcullen, Smith & Heenan
1800 M Street, N.W., Suite 600
Washington, D.C. 20036

DENNIS B. DUBAY

Keller, Thoma, Toppin
& Schwarze, P.C.
1600 City National Bank Building
Detroit, Michigan 48226

RAYMOND J. LaJEUNESSE, JR.

National Right To Work Legal
Defense Foundation
8316 Arlington Boulevard, Suite 600
Fairfax, Virginia 22038

EDWIN VIEIRA, JR.

12408 Greenhill Drive
Silver Spring, Maryland 20904

Supreme Court, U. S.
FILED

SEP 10 1976

MICHAEL RODAK, JR., CLERK

IN THE

**SUPREME COURT
OF THE UNITED STATES**

October Term, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

CHRISTINE WARCZAK, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

On Appeal From the Court of Appeals of Michigan

BRIEF FOR APPELLEES

THEODORE SACHS
Attorney for Appellees
1000 Farmer
Detroit, Michigan 48226

TABLE OF CONTENTS

| | <i>Page</i> |
|---|-------------|
| COUNTER-STATEMENT OF QUESTIONS PRESENTED | x |
| COUNTER-STATEMENT OF THE CASE | 1 |
| 1. The Complaint | 1 |
| 2. The Course of the Litigation | 3 |
| 3. The Ruling Below | 5 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 8 |
| ARGUMENT | 9 |
| I. APPELLANTS' AGENCY SHOP PAYMENTS WILL NOT INCLUDE UNION EXPENDI- TURES WHICH WOULD VIOLATE ANY FIRST AMENDMENT RIGHT OF ABSTEN- TION FROM POLITICAL ACTIVITY | 9 |
| II. THE STATES IN THE CONTROL OF THEIR OWN LABOR RELATIONS MAY PROPERLY REQUIRE ALL EMPLOYEES WHO BENE- FIT FROM EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATION TO SHARE ITS COSTS, FOR LABOR RELA- TIONS STABILITY, AND AS A JUSTIFIED COMPROMISE BETWEEN THE BURDENS OF COMPULSORY MEMBERSHIP AND THE INEQUITIES OF REPRESENTATION WITHOUT TAXATION | 13 |
| A. This Court's Recent Decisions Recognize the States' Broad Discretion to Set the Terms and Conditions of Their Public Em- ployment | 14 |

Page

| | |
|---|----|
| B. <i>Hanson</i> Upheld the Rule, Later Perfected in <i>Street</i> and <i>Allen</i> , That All Employees Who Reap the Benefits of the Statutory Collective Bargaining System May Be Required to Share its Costs | 18 |
| C. The Compulsory Support Rule Approved in <i>Hanson</i> is Equally Justified in Public Employment Bargaining | 23 |
| 1. Michigan, like more than forty states, has adopted the federal model of exclusive and fair representation, with its significant costs and benefits | 23 |
| 2. Michigan, like approximately a third of the states, has also appropriately authorized financial support requirements for the bargaining process, which process is essentially economic, not "political" | 31 |
| D. Pro-Rata Payments By Each Employee Toward the Cost of Bargaining Do Not Constitute "Association" Subject to First Amendment Restraints, And Are In Any Event Consonant with the Requirements of That Amendment | 40 |
| CONCLUSION | 48 |

APPENDIX

Page

| | |
|--|-----|
| A-1: States—including the District of Columbia—where public employee collective bargaining is expressly permitted by statute, executive order, or regulation | 1b |
| A-2: States permitting public employee collective bargaining by court or attorney general opinion | 10b |
| A-3: States—including the District of Columbia—permitting union security for some or all public employees | 11b |
| B: DFT Bylaws, Article II | 19b |

TABLE OF AUTHORITIES

| | Page |
|---|----------------|
| Cases | |
| <i>Bishop v Wood</i> , — US —, 44 LW 4820 (1976) | 16, 17 |
| <i>Broadrick v Oklahoma</i> , 413 US 601 (1973) | 17, 42, 47 |
| <i>Brown v Allen</i> , 344 US 443 (1953) | 12 |
| <i>Buckley v American Federation of Television & Radio Artists</i> , 496 F2d 305 (CA 2, 1974), cert den 419 US 1093 (1974), reh den 420 US 956 (1975) | 45 |
| <i>Buckley v Valeo</i> , — US —, 44 LW 4127 (1976) | 43 |
| <i>Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc</i> , 370 Mich 334, 121 NW2d 836 (1963) | 6 |
| <i>Ciba-Geigy Corp v Local No. 2548, United Textile Workers</i> , 391 F Supp 287, 88 LRRM 3187 (D RI, 1975) | 46 |
| <i>City of Charlotte v Local 660 International Association of Fire Fighters</i> , — US —, 44 LW 4801 (1976) | 17, 41 |
| <i>Civil Service Commission v Letter Carriers</i> , 413 US 548 (1973) | 17, 42, 43, 45 |
| <i>Copperweld Steel Co v Industrial Commission of Ohio</i> , 324 US 780 (1945) | 12 |
| <i>Cousins v Wigoda</i> , 419 US 477 (1975) | 43 |
| <i>Cramp v Board of Public Instruction of Orange Co, Florida</i> , 368 US 278 (1961) | 11 |
| <i>Crestwood Education Association v Board of Education of School District of Crestwood</i> , — US —, 44 LW 3747 (1976) | 16, 26, 46 |
| <i>Detroit Federation of Teachers v Detroit Board of Education</i> , 396 Mich 220, 240 NW2d 225 (1976) | 27 |
| <i>Detroit Police Officers Association v City of Detroit</i> , 391 Mich 44, 214 NW2d 803 (1974) | 26, 27 |

| | Page |
|---|------------|
| <i>Dodge v Detroit Trust Co</i> , 300 Mich 525, 2 NW2d 509 (1942) | 3 |
| <i>Drouillard v City of Roseville</i> , 9 Mich App 239, 156 NW2d 628 (1967) | 6 |
| <i>Edelman v People of the State of California</i> , 344 US 357 (1953) | 12 |
| <i>Emporium Capwell Co v Western Addition Community Organization</i> , 420 US 50 (1975) | 25, 41 |
| <i>Farrigan v Helsby</i> , 42 App Div 2d 265, 346 NYS2d 39 (1973) | 32 |
| <i>Ford Motor Co v Huffman</i> , 345 US 330 (1953) | 25 |
| <i>Gray v Gulf, Mobile & Ohio Railroad Co</i> , 429 F2d 1964 (CA 5, 1970), cert den 400 US 1001 (1971) | 46 |
| <i>Hammond v United Papermakers and Paperworkers Union, AFL-CIO</i> , 462 F2d 174 (CA 6, 1972), cert den 409 US 1028 (1972) | 46 |
| <i>Handwerk v United Steelworkers of America</i> , 67 Mich App 747, — NW2d — (1976) | 29 |
| <i>Hayward v United Public Service Employees, Local 390</i> , 54 Cal App 3d 761, 126 Cal Reprtr 710 (1976) | 32 |
| <i>Herb v Pitcairn</i> , 324 US 117 (1945) | 12 |
| <i>Hines v Anchor Motor Freight, Inc</i> , — US —, 44 LW 4299 (1976) | 25 |
| <i>Hortonville Joint School District No. 1 v Hortonville Education Association</i> , — US —, 44 LW 4864 (1976) | 15, 16, 47 |
| <i>Humphrey v Moore</i> , 375 US 335 (1964) | 25 |
| <i>International Association of Machinists v Street</i> , 367 US 740 (1961) | 4, 10, 21 |

| | <i>Page</i> |
|---|--------------------|
| <i>J I Case Co v NLRB</i> , 321 US 332 (1944) | 25, 27 |
| <i>Kelley v Johnson</i> , — US —, 44 LW 4469 (1976) | 17, 18 |
| <i>Koebke v LaBuda</i> , 339 Mich 569, 64 NW2d 914 (1954) .. | 3 |
| <i>Kusper v Pontikes</i> , 414 US 51 (1973) | 43 |
| <i>Lathrop v Donohue</i> , 367 US 820 (1961) | 12, 22, 39, 40, 41 |
| <i>Linscott v Millers Falls Co</i> , 440 F2d 14 (CA 1, 1971), cert den 404 US 872 (1971) | 32, 46 |
| <i>Lowe v Hotel and Restaurant Employees Union</i> , 389 Mich 123, 205 NW2d 167 (1973) | 29 |
| <i>Massachusetts Board of Retirement v Murgia</i> , — US —, 44 LW 5077 (1976) | 16, 47 |
| <i>Massachusetts Nurses Association v Lynn Hospital</i> , 306 NE2d 264 (Mass Sup Jud Ct, 1974) | 32 |
| <i>McCarthy v Philadelphia Civil Service Commission</i> , — US —, 44 LW 3530 (1976) | 17 |
| <i>McGrail v Detroit Federation of Teachers</i> , 82 LRRM 2623 (Wayne Circuit Court, 1973), aff'd Mich Court of App, No. 16493 (1974) | 29 |
| <i>Mellon Co v McCafferty</i> , 239 US 134 (1915) | 12 |
| <i>Michigan Employment Relations Commission v Reeths- Puffer School District</i> , 391 Mich 253, 215 NW2d 672 (1974) | 26 |
| <i>Myers v Bethlehem Shipbuilding Corp</i> , 303 US 41 (1938) | 12 |
| <i>National League of Cities v Usery</i> , — US —, 44 LW 4974 (1976) | 15, 36, 46 |
| <i>NLRB v Allis-Chalmers Mfg Co</i> , 388 US 175 (1967) .. | 25, 41 |
| <i>NLRB v General Motors Corp</i> , 373 US 734 (1963) | 23 |

| | <i>Page</i> |
|--|--|
| <i>NLRB v Jones & Laughlin Steel Corp</i> , 301 US 1 (1937) | 25, 41 |
| <i>Oakland County Sheriffs' Dept</i> , 1968 MERC Lab Op 1(a) | 29 |
| <i>Oil, Chemical and Atomic Workers, International Union, AFL-CIO v Mobil Oil Corporation</i> , — US —, 44 LW 4842 (1976) | 18 |
| <i>Pickering v Board of Education</i> , 391 US 563 (1968) | 17, 42, 43, 44, 47 |
| <i>Plassey v S. Loewenstein & Son</i> , 330 Mich 525, 48 NW2d 126 (1951) | 3 |
| <i>Police Dept. v Mosley</i> , 408 US 92 (1972) | 41 |
| <i>Prawdzik v Heidema Brothers, Inc.</i> , 352 Mich 102, 89 NW2d 523 (1958) | 3 |
| <i>Railway Clerks v Allen</i> , 373 US 113 (1963) | 10 |
| <i>Railway Employes' Dept, American Federation of La- bor, International Association of Machinists v Han- son</i> , 351 US 225 (1956) | 7, 13, 18, 19, 20, 23, 41, and <i>passim</i> |
| <i>Regents of the University of Michigan v Employment Relations Commission</i> , 389 Mich 96, 204 NW2d 218 (1973) | 26 |
| <i>Retail Clerks v Schermerhorn</i> , 373 US 746 (1963) | 23 |
| <i>Rockwell v Crestwood School District</i> , 393 Mich 616 (1975), appeal dismissed for want of substantial fed- eral question, <i>sub nom</i> , <i>Crestwood Education Associ- ation v Board of Education of Crestwood</i> , — US —, 44 LW 3747 (1976) | 26 |
| <i>Smigel v Southgate Community School District</i> , 388 Mich 531, 202 NW2d 305 (1972) | 3, 32 |

| | <i>Page</i> |
|---|-------------|
| <i>Steele v Louisville & Nashville Railroad Co</i> , 323 US 192 (1944) | 25 |
| <i>Syres v Oil Workers International Union</i> , 350 US 892 (1955) | 25 |
| <i>Todd v Biglow</i> , 51 Mich App 346, 214 NW2d 733 (1974) | 6 |
| <i>Tremblay v Berlin Police Union</i> , 108 NH 416, 237 A2d 668 (1968) | 32 |
| <i>Vaca v Sipes</i> , 386 US 171 (1967) | 41 |
| <i>Vorbeck v McNeal</i> , 407 F Supp 733 (ED Mo, 1976), aff'd mem, — US —, 44 LW 3737 (1976) | 17 |
| <i>Wayne County Civil Service Commission v Board of Supervisors</i> , 384 Mich 363, 184 NW 2d 201 (1971) | 26 |
| <i>Wondzell v Alaska Wood Products, Inc</i> , 91 LRRM 2902 (Alas. Super. Ct, 1975) | 46 |
| <i>Woods v Nierstheimer</i> , 328 US 211 (1946) | 12 |
| <i>Yott v North American Rockwell Corp</i> , 501 F2d 398 (CA 9, 1974) | 46 |
| Statutes, Regulations and Court Rules | |
| Executive Orders 10988, 11491, 11616, 11636, 11838, and 11901 | 24 |
| Federal Rules Civ. Procedure 12(b)(6) | 3 |
| Michigan General Court Rules, GCR 116.4 | 6 |
| Michigan Public Employment Relations Act (1965 PA 379, MCLA 423.201 et seq, MSA 17.455(1) et seq) | 25 |
| MSA 17.455(9), MCLA 423.209 | 26 |
| MSA 17.455(10)(1)(c), MCLA 423.210(1)(c) | 5 |
| MSA 17.455(10)(2), MCLA 423.202 | 5 |
| MSA 17.455(11), MCLA 423.211 | 26 |
| MSA 17.455(12), MCLA 423.212 | 26 |
| MSA 17.455(15), MCLA 423.215 | 26 |

| | <i>Page</i> |
|---|-------------|
| National Labor Relations Act, 29 USC 158 §8(a)(3), 29 USC 158(2)(3) | 21 |
| Miscellaneous | |
| Blair, <i>Union Security Agreements in Public Employment</i> , 60 Cornell L Rev 183 (1975) | 33 |
| Gromfine, <i>Union Security Clauses in Public Employment</i> , 22nd NYU Conference on Labor 285 (1969).... | 33 |
| Mosher, <i>Democracy and the Public Service</i> (1968) | 37 |
| Moskow, Loewenberg and Koziara, <i>Collective Bargaining in Public Employment</i> (1970) | 36 |
| Petro, <i>Sovereignty and Compulsory Public-Sector Bargaining</i> , 10 Wake Forest L Rev 25 (1974) | 37 |
| Rehmus and Wilner, <i>The Economic Results of Teacher Bargaining: Michigan's First Two Years</i> (1968) | 29 |
| Smith, Edwards and Clark, <i>Labor Relations Law in the Public Sector</i> (1974) | 35 |
| Spero and Cappozzola, <i>The Urban Community and Its Unionized Bureaucracies: Pressure Politics in Local Government Labor Relations</i> (1973) | 36 |
| <i>Summary of State Policy Regulations and Public Sector Labor Relations</i> , U.S. Department of Labor-Labor-Management Services Administration, Division of Public Employee Labor Relations (1975) | 24 |
| Summers, <i>Public Sector Bargaining: Problems of Governmental Decision-making</i> , 44 Cincinnati L Rev 669 (1975) | 38 |
| Summers, <i>Public Employee Bargaining: A Political Perspective</i> , 83 Yale L J 1156 (1974) | 38 |
| Waks, <i>Impact of the Agency Shop on Labor Relations in the Public Sector</i> , 55 Cornell L Rev 547 (1970) | 33 |
| Wellington and Winter, <i>The Unions and the Cities</i> (1971) | 34 |

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. UNDER MICHIGAN'S PUBLIC EMPLOYMENT RELATIONS ACT THE DETROIT BOARD OF EDUCATION ENTERED INTO A COLLECTIVE BARGAINING AGREEMENT WITH THE DETROIT FEDERATION OF TEACHERS (DFT), THE CERTIFIED EXCLUSIVE BARGAINING REPRESENTATIVE OF ALL TEACHERS IN THE BARGAINING UNIT, TO WHOM THE DFT OWES A DUTY OF FAIR REPRESENTATION. THE AGREEMENT REQUIRED, PURSUANT TO AUTHORIZATION OF THE ACT, THAT ALL BARGAINING UNIT MEMBERS PAY A SERVICE FEE EQUIVALENT TO DUES AS A CONDITION OF EMPLOYMENT. DOES THE ACT OR AGREEMENT VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

- II. THE MICHIGAN COURTS REFUSED TO DENY ENFORCEMENT OF THE AGENCY SHOP PROVISION, AS SOUGHT BY APPELLANTS WHO HAVE BEEN EXCUSED FROM PAYING ANY SERVICE FEES TO DATE, BUT HELD THAT TEACHERS OBJECTING TO UNION EXPENDITURES FOR POLITICAL PURPOSES WERE ENTITLED TO REQUEST REFUND OF THEIR PROPORTIONATE SHARE OF SUCH EXPENDITURES, A SPECIFIC PROTEST BEING A CONDITION TO SUCH RESTITUTION. DOES THE ACT, SO INTERPRETED, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS?

IN THE
**SUPREME COURT
OF THE UNITED STATES**

October Term, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

CHRISTINE WARCZAK, et al.,
Appellants,

v.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

On Appeal From the Court of Appeals of Michigan

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

1. *The Complaint*

On November 7, 1969, plaintiff Warczak and various other named teachers filed a complaint for declaratory

relief, challenging the constitutional and statutory validity of the agency shop provision in the collective bargaining agreement between the Detroit Board of Education, their employer, and the Detroit Federation of Teachers (sometimes hereinafter, the Union).¹ The Federation is their statutory bargaining representative.² Plaintiffs purported to file the action on behalf of themselves and all others similarly situated (A. 7); they named as defendants the Board, the Federation, the Federation's officers and (as a purported class) all fellow teachers who were members of the Federation. At the time the suit was filed the agency shop clause of the contract was not in effect and was not scheduled to go into effect until January 26, 1970. (A. 9) Nevertheless, although no service fee monies had yet been collected, plaintiffs alleged "that a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used" for the support of

¹"A. All employees, employed in the bargaining unit, or who became employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members. This provision is effective Monday, January 26, 1970. * * *" (A. 9)

²The Federation was initially accorded exclusive recognition after a school-board sponsored representation election in 1964, prior to Michigan's adoption of the Public Employment Relations Act (PERA) in 1965. Later the Federation was certified as exclusive bargaining agent by the Michigan Labor Mediation Board (now called Michigan Employment Relations Commission) under Section 11 of PERA, Michigan Compiled Laws Annotated (hereinafter MCLA) 423.211, Michigan Statutes Annotated (hereinafter MSA) 17.455(11), following its prevailing in a secret ballot election under the auspices of the Labor Board on April 19, 1967. The majority status of the Federation has not since been questioned.

unspecified "activities and programs which are economic, political, professional, scientific and religious in nature of which plaintiffs do not approve." (A. 14) Alleging that the required payment of the agency shop fee deprived them of freedom of association and other rights under "the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments and their penumbras" and various Michigan constitutional and statutory provisions, plaintiffs asked a declaratory judgment that the agency shop clause is invalid. (A. 13) They did not seek injunctive relief against expenditures of such monies, nor seek any rebates or limitations on payments for portions which might be spent for political causes.

2. *The Course of the Litigation*

Defendants moved to dismiss on the pleadings for alleged failure of plaintiffs to state a claim upon which relief could be granted. Holding that "the agency shop provision is not repugnant to any statute or constitutional provision," the Wayne Circuit Court granted the motion. (A. 29, 35)³ On appeal, the Michigan Supreme Court on December 28, 1972, vacated the dismissal order in *Warczak* (A. 59) and remanded the case to the Circuit Court for further proceedings consonant with the intervening decision in *Smigel v Southgate Community School District*, 388 Mich 531, 202

³Contrary to appellants' contention, defendants' motion under Michigan practice did not admit even for purposes of the motion plaintiffs' legal conclusions or unwarranted factual deductions. *Prawdzik v Heidema Brothers, Inc.*, 352 Mich 102, 109, 110, 89 NW 2d 523 (1958); *Koebke v LaBuda*, 339 Mich 569, 573, 64 NW 2d 914 (1954); *Dodge v Detroit Trust Co.*, 300 Mich 575, 595, 596, 2 NW 2d 509 (1942); *Plassey v S. Loewenstein & Son*, 330 Mich 525, 528-529, 48 NW 2d 126 (1951) (pleaded anticipated wrongs held mere anticipatory conclusions). Cf. Federal Rule 12(b)(6), 2A Moore's Federal Practice ¶12.08, 2266-2269 and note 4. "For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted."

NW2d 305 (1972), which had held that for statutory reasons (the want of express authorization therefor) an agency shop provision was prohibited under Section 10 of the Public Employment Relations Act.

In the meantime, on April 23, 1970, after the original Circuit Court dismissal of *Warczak*, a new suit had been filed by Warczak's counsel for Abood and other teachers. Although making substantially identical allegations to those in the *Warczak* complaint, the *Abood* plaintiffs did not purport to bring a class action (though they purported to be part of the original *Warczak* "class"). They sought similar declaratory relief, and an injunction against their discharge under the agency shop clause. Like the *Warczak* plaintiffs, they did not seek to restrain expenditure of any monies collected, nor claim any sort of rebate, nor identify any specific causes to which they objected.⁴

After the Michigan Supreme Court had remanded in

⁴ Contrary to the contention in their brief (p. 4) that they number "several hundred", or in their earlier Jurisdictional Statement (p. 7) that they number "600", *Abood* and *Warczak* appellants together constitute at most a few dozen employees in this 11,000 employee bargaining unit. According to appellees' records, 167 of the named Warczak and 162 of the named Abood plaintiffs are not even in the bargaining unit (Warczak: no record of employment, 10; deceased, 7; terminated, 14; supervisors, 13; retired, 75; resigned, 31; released, other than "terminated", 8; on leave, 9. Abood: no record of employment, 18; deceased, 6; terminated, 12; supervisors, 12; retired, 51; resigned, 45; released, other than "terminated", 10; on leave, 8). Of the remaining number, despite a stay of enforcement contained in the agency shop clause itself (see n. 6, *infra*), 128 Warczak and 131 Abood plaintiffs elected to become (or remain) members of the Federation, 35 Warczak and 27 Abood plaintiffs are paying agency shop fees (some "under protest"), and only 11 Warczak and 9 Abood plaintiffs are doing neither. Those who are in the bargaining unit who are making payments "are of course in the entirely different position of voluntary or acquiescing dues payers, which they have every right to be, and . . . the decree in this case should not affect them." Black, J., in *Machinists v Street*, 367 US 740, 794-795 (1961) (dissenting on other grounds).

Warczak but before any further action was taken by the Circuit Court in either case, the Michigan legislature amended Section 10 of PERA on June 14, 1973, by Public Act 25 of 1973, to authorize expressly agency shop agreements requiring public employees to pay service fees: " . . . nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Section 10(1)(c) (proviso), MCLA 423.210(1)(c), MSA 17.455(10)(1)(c). The legislature stated the purpose of the amendatory act to be to "reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Sec. 10(2), MCLA 423.210(2), MSA 17.455(10)(2).

Upon enactment of the amendment, defendants renewed their motions to dismiss, and the trial judge granted the motions in both *Warczak* and *Abood*. Plaintiffs appealed to the Michigan Court of Appeals.

3. The Ruling Below.

Plaintiffs' appeal to the Michigan Court of Appeals urged two principal contentions which are presently before

this Court. First, they contended that the very concept of compulsory financial support to the union which is their statutory bargaining representative violates the Federal Constitution. In addition, and in support of their basic claim, they contended that their required payments to the union are or may be used for political purposes. With respect to the second point, they cited no particular political expenditures to which they were opposed;⁵ and while some of them had commenced paying service fees (see *supra*, n. 4) they were not, pending litigation, under any compulsion to do so.⁶

The Michigan Court of Appeals rejected the plaintiffs' direct attack on the concept of compulsory financial sup-

⁵ Appellants' so-called "offer of proof" (brief, 5) had added nothing. First, it was not part of the record below; under Michigan practice, on a motion to dismiss for failure to state a claim, only the challenged pleading and not affidavits tendered in support or opposition to the motion may be considered. *Chatham Super Markets, Inc v Ajax Asphalt Paving, Inc*, 370 Mich 334, 121 NW2d 836 (1963); *Drouillard v City of Roseville*, 9 Mich App 239, 156 NW2d 628 (1967); *Todd v Biglow*, 51 Mich App 346, 214 NW2d 733 (1974). Second, having been filed like the original complaint prior to the effective date of the agency shop clause, it could not credibly represent in the present tense "that a substantial part of the sums required to be paid under said agency shop clause are used" for purposes to which the plaintiffs assertedly objected. Third, contrary to appellants' brief (p. 6), the "offer of proof" would have been legally insufficient in any event, because not supported by competent affidavits of personal knowledge in compliance with the applicable Michigan court rule, GCR 116.4. And finally, the "offer of proof" was virtually as vague and general as the complaint itself; in fact, the supporting affidavit equivocally asserted that the Federation's revenues are "devoted to political and social [sic] purposes of which I do not necessarily approve." (A. 25, emphasis added).

⁶ The agency shop clause itself contained a provision (§B, A. 10) staying enforcement against those employees engaged in its litigation, pending resolution of such litigation. Under such provision, expansively construed by appellee Board, no enforcement action has been taken by the Board against *Abood* and *Warczak* plaintiffs who have paid neither dues nor service fees to date. Thus no appellant has yet been compelled to pay any money to the Union.

port. The Court relied chiefly upon this Court's decision in *Railway Employees' Department v Hanson*, 351 US 225 (1956), for the conclusion that Michigan may require all public employees who are represented in statutory collective bargaining and who benefit therefrom to share in its costs. (A. 100) As concerns plaintiffs' alternative claim of forced political contributions, however, the Michigan Court of Appeals upheld their basic claim to be free from compulsory support of political expenditures. The Court, quoting the concurring opinion of Mr. Justice Douglas in *Street*, concluded that if the required agency shop payments included political expenditures they "could violate plaintiffs' First and Fourteenth Amendment rights." (A. 102) The Court accordingly analyzed alternative remedies reviewed in this Court's *Street* decision, and expressed its preference for the remedy of "restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." (A. 103-104) The Court noted that such remedy "will least interfere with unions carrying out their daily functions." (A. 104)

The Court, however, declined to grant any specific relief to plaintiffs concerning expenditures for political purposes, on the ground that such relief was premature. On this score the Court ruled as follows:

"To reiterate briefly, employees who are forced to contribute service fees to a collective bargaining

⁷ Appellants assert that the Court of Appeals found that the legislature "intended" the coerced political use of service fee payments. We disagree. The Court of Appeals having expressly required rebates covering political expenditures appropriately objected to by any dissenting employees, and the defendants having accepted that Court's decision, that is the governing state ruling before this Court.

representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection.

In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore the plaintiffs are not entitled to relief on this basis." (A. 104)

Following this ruling, an appeal taken by plaintiffs and a cross-appeal on an unrelated issue by defendants were denied by the Michigan Supreme Court because "appellants have failed to persuade the Court that the questions should be reviewed by this Court." (A. 124) This Court subsequently noted probable jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants advance two separate but interwoven attacks on the requirement, authorized by the Michigan statute and imposed by the contract with the Detroit School Board, that they give financial support to the Union which represents them in collective bargaining and grievance negotiation. On the one hand, they frontally challenge the requirement that they contribute to the costs of the statutory bargaining process which yields them employment benefits (Question I). On the other, they seek to bolster that attack with a claim that their payments will or may be used for political expenditures by the Union, to which expenditures they object (Question II). But it is clear that, once they commence paying, appellants' dues cannot and will not be used by the Union for political activities. We so dem-

onstrate in Point I. Thereafter in Point II of the Argument we show that the Constitution does not preclude the "agency shop" compromise, which requires each employee to share in the costs of the bargaining process without requiring him to become a member of the union.

In that respect it is of crucial significance that only last term this Court repeatedly recognized the broad discretion of states to determine and limit the terms and conditions of their own public employment. Michigan, like some one-third of the States, has merely conformed in its own labor relations to the same cost-sharing principle adopted by the Congress in federal labor relations, which was upheld by this Court in *Hanson* against First and Fifth Amendment objections. That rule is no less appropriate in public employment than in the private sector. The collective bargaining pattern of the federal statutes has been adopted by most of the states in their own public employment; and the public sector process is functionally like that in the private sector, and equally beneficial to all employees required to share its costs. Moreover, appellants' First Amendment attack on the cost-sharing principle is repelled by this Court's rulings recognizing that public employees cannot claim unrestricted rights of association or abstention in areas of justified public and governmental interests.

ARGUMENT

I

APPELLANTS' AGENCY SHOP PAYMENTS WILL NOT INCLUDE UNION EXPENDITURES WHICH WOULD VIOLATE ANY FIRST AMENDMENT RIGHT OF ABSTENTION FROM POLITICAL ACTIVITY.

Appellants have not yet been required to pay any agency fees under the statute and contract here involved. They

nevertheless assert that once their payments commence, the Michigan court has permitted their use for Union political activities in violation of appellants' First Amendment right to abstain from political activities and contributions. But whereas appellants would treat the ruling below as a rejection of the dissenter's right to withhold support to union political expenditures, in fact the ruling below squarely upholds that right. Thus, the Michigan Court of Appeals' opinion stated that because the Michigan statute did not expressly provide for a political expenditures exception—which this Court's decision in *Machinists v Street*, 367 US 740 (1961) found implicit in the Railway Labor Act—the statute “could violate plaintiffs' First and Fourteenth Amendment rights.” (A. 102) To avoid such violation, and recognizing that those required to pay service fees “may not be deprived of First Amendment freedom of expression” (A. 104), the Michigan court went on to discuss the alternative remedies suggested in the *Street* opinion. It stated its approval of the remedy of “restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed.” (A. 103-104) Under this ruling it is perfectly clear that the applicable Michigan rule is now the same rule this Court announced and applied in *Street* and in *Railway Clerks v Allen*, 373 US 113 (1963), and it clearly bars the political use over their objection of appellants' agency shop payments.⁸

⁸ Appellants argue that the Michigan statute, even as above construed to assure that objecting public employees need not support political activities with which they disagree, is unconstitutionally overbroad. But this contention is nothing more than a reformulation of the freedom of association argument advanced and rejected in *Hanson*. The point established by *Hanson*, *Machinists v Street*, 367 US 740 (1961), and *Railway Clerks v Allen*, 373

Moreover, the right recognized by Michigan is now also recognized and preserved by the governing rules and bylaws of the Union itself, applicable to all members and dues payers, including these petitioners. In bylaws recently adopted, the Federation provides an administrative rebate procedure to political objectors which conforms with this Court's suggestion in *Allen* (at p. 122). See Appendix B, *infra*. Under the procedure, the dissenting employee may simply protest at the start of each school year the expenditure of any part of his agency shop fee for “activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment.” The Federation is obliged to ascertain the portion of its expenditures for such purposes, and to make a *pro rata* refund to the objector. A review procedure, including terminal review by an impartial board, is provided to the objecting employee.

Thus, both the governing law of Michigan and the governing bylaws of the Union give assurance that when appellants commence their agency fee payments they will not be required to pay for union political activities.

However, appellants object that under the ruling below an employee must first make his objection known to the

US 113 (1963), is that a statute which provides for required dues or fees payments is constitutional so long as employees who give proper notice of their objection are personally relieved of the obligation to finance political activities with which they disagree; but that they are not entitled to interfere with dues or fees obligations, or with expenditures generally. That is exactly how the Michigan courts have interpreted the Michigan statute and the construction of that statute by the state courts is dispositive. “We accept without question [the state court's] view of the statute's meaning, as of course we must. [The] authoritative interpretation by the [State] Supreme Court ‘puts these words in the statute as definitely as if it had been so amended by the legislature.’” *Cramp v Board of Public Instruction*, 368 US 278, 285 (1961).

Union in order to perfect his dissenter's right of abstention. But it is recognized by this Court's rulings in *Allen* (at p. 118, n. 5) and *Lathrop v Donohue*, 367 US 820, 845-848 (1961), that the notice required for invocation of a constitutional objection to political expenditures may be greater than that for invocation of the federal statutory limitations recognized by *Street*. Nothing in *Street* suggests that state courts may not require prior protest to the union as a prerequisite to invocation of judicial relief, or casts doubt upon "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v Bethlehem Shipbuilding Corp*, 303 US 41, 50-51 (1938). Appellants, like other state court litigants, must pursue their remedies in the manner that state law prescribes for the vindication of their rights, and no federal question is raised in the absence of such pursuit. See e.g., *Lathrop v Donohue*, 367 US 820, 845-848 (1961); *Mellon Co v McCafferty*, 239 US 134 (1915); *Herb v Pitcairn*, 324 US 117 (1945); *Copperweld Steel Co v Industrial Commission*, 324 US 780 (1945); *Woods v Nierstheimer*, 328 US 211 (1946); *Edelman v California*, 344 US 357 (1953); *Brown v Allen*, 344 US 443 (1953).

In *Hanson*, as here, the dues payment obligation was directly under attack, but this Court declined a premature resolution concerning political expenditures from dues. 351 US at 238. Only when the expenditure question was concretely presented in *Street* did this Court resolve it. Here Michigan courts have merely followed this Court's lead, declining in a suit challenging the agency shop (and, like *Hanson*, filed before the provision was even in effect) to grant relief against political expenditures from fees appellants have not yet paid and the Union has not yet spent.

Here both Michigan and the Union have provided fair and adequate protection to appellants against the political use of their dues payments once they have made proper objection to such use. There is thus no issue of political expenditures in this case.⁹ What remains is appellants' broader claim that they may not be legally required to share in the costs of the bargaining process in which the Union, pursuant to law, engages on their behalf and to their benefit. We turn now to that central question.

II

THE STATES IN THE CONTROL OF THEIR OWN LABOR RELATIONS MAY PROPERLY REQUIRE ALL EMPLOYEES WHO BENEFIT FROM EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATION TO SHARE ITS COSTS, FOR LABOR RELATIONS STABILITY, AND AS A JUSTIFIED COMPROMISE BETWEEN THE BURDENS OF COMPULSORY MEMBERSHIP AND THE INEQUITIES OF REPRESENTATION WITHOUT TAXATION.

Apart from appellants' unfounded claim that the decision below subjects them to coerced support of union political expenditures, they advance a more fundamental attack upon the requirement that they provide financial support to the union which is their statutory bargaining representative. Appellants would evade or erode the principle, long ago adopted by the Congress and upheld by this Court, which requires "the beneficiaries of trade unionism to contribute to its costs". *Railway Employees' Department v Hanson*, 351 US 225, 235 (1956). They claim that the First

⁹ Appellants advance an alternative and quite different political expenditures argument to the effect that collective bargaining for public employees is inherently "political" in character. Since that claim is advanced as part of appellants' broader attack on the concept of compulsory fees in public employment, we address it hereafter (p. 35) in the analysis of appellants' efforts to distinguish and avoid the *Hanson* ruling.

Amendment forbids requiring public employees to support the costs of collective bargaining which a union carries on, and by law must fairly carry on, for all the employees.

We proceed to demonstrate the multiple fallacies in appellants' extravagant claim. In Section A we review numerous recent decisions of this Court which recognize broad state discretion to set the terms and conditions of public employment. We demonstrate in Section B that this Court upheld in *Hanson*, and perfected in *Street* and *Allen*, the basic rule that employees who are beneficiaries of the statutory collective bargaining system may be required to share in its costs. In Section C we show that the agency shop—a compromise between the burdens of compulsory union membership and the inequities of representation without taxation—is equally justified in public employment. Finally, in Section D we show that requiring each employee to give pro-rata support to the costs of collective bargaining does not constitute forced “association” within the meaning of the First Amendment, and in any event meets the Amendment's requirements.

A. This Court's Recent Decisions Recognize the States' Broad Discretion to Set the Terms and Conditions of Their Public Employment.

A series of significant decisions in the term just concluded upholds against constitutional attack the broad authority of public employers to control their own labor relations. These decisions, especially when coupled with *Hanson* (Part B below), foreclose appellants' claims. For they flatly repudiate what would have to be plaintiffs' indispensable propositions to distinguish *Hanson*: (1) that the Constitution more strictly limits the power of the states to set the terms of their own employees' employment rela-

tions than it limits the ability of Congress to make policy judgments regarding labor relations generally; and (2) that public employees have constitutional rights greater than those of citizens generally.

Thus, in *National League of Cities v Usery*, — US —, 44 LW 4974 (1976), the Court declared unconstitutional the minimum wage and overtime provisions of the 1974 amendments to the Fair Labor Standards Act, for intrusion upon what were held to be the sovereign powers of the states. “One undoubted attribute of state sovereignty,” the Court said, “is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.” 44 LW 4977. Concluding that these determinations are functions essential to the states’ “‘separate and independent existence,’ ” this Court held that Congress was without authority to “abrogate the States' otherwise plenary authority to” deal with these matters. 44 LW 4977.

Hortonville Joint School District v Hortonville Education Association, — US —, 44 LW 4864 (1976), upheld against due process attack a school board's authority to dismiss striking teachers. “State law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teachers' strike; by virtue of electing them the constituents have declared the Board members qualified to deal with these problems, and they are accountable to the voters for the manner in

which they perform. Second, the state legislature has given to the Board the power to employ and dismiss teachers, as part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision at issue here preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law." 44 LW 4868. Accordingly, the Court refused "to strip the Board of the otherwise unremarkable power" of discharge, "a power of every employer, whether it is negotiated with the employees before discharge or not." 44 LW 4867. Shortly following *Hortonville*, the Court dismissed for want of a substantial federal question the appeal from the decision of the Michigan Supreme Court upholding under the same Michigan statute here in issue, the discharge of an entire district's striking teachers. *Crestwood Education Association v Board of Education of School District of Crestwood*, — US —, 44 LW 3747 (1976).

Massachusetts Board of Retirement v Murgia, — US —, 44 LW 5077 (1976), upheld state power to compel policemen to retire at age 50, the Court applying a "rational basis standard" and rejecting the proposition "that a right of governmental employment per se is fundamental." 44 LW 5079.

Bishop v Wood, — US —, 44 LW 4820 (1976), sustained a policeman's discharge without a hearing (and assertedly on false charges), the Court stating that, "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made

daily by public agencies." 44 LW 4822-23. The Court emphasized that "the ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion." 44 LW 4823, n. 14.

McCarthy v Philadelphia Civil Service Commission, — US —, 44 LW 3530 (1976), upheld a municipally imposed residency requirement for city employees. Rejecting "strict scrutiny" and similar arguments and citing earlier cases, the Court stated (note 6) that "a public agency's relationship with its own employees * * *, of course, may justify *greater* control than over the citizenry at large. Cf *Pickering v Board of Education*, 391 US 563, 568; *Civil Service Commission v Letter Carriers*, 413 US 548; *Broadrick v Oklahoma*, 413 US 601."

Vorbeck v McNeal, — US —, 44 LW 3737 (1976), affirmed a three-judge court decision which had upheld, despite First and Fourteenth Amendment objections, a law's denial of collective bargaining to policemen, even while permitting it to other public employees.

City of Charlotte v Local 660, International Association of Fire Fighters, — US —, 44 LW 4801 (1976), upheld on a reasonableness test the denial by a municipality of employee-authorized union dues checkoffs despite withholdings from employee salaries for other purposes.

Kelley v Johnson, — US —, 44 LW 4469 (1976), upheld, despite First and Fourteenth Amendment contentions to the contrary, a police department grooming code. The Court reemphasized "the wide latitude accorded the Government in the 'dispatch of its own internal affairs.'" The Court also emphasized that the standard for review was not whether the state can "establish" a 'genuine public

need' for the specific regulation,' but whether a complaining employee "can demonstrate that there is no rational connection between the regulation * * * and the promotion of safety of persons and property." — US —, 44 LW 4472.

This Court has thus most recently given emphasis and recognition to the breadth of state discretion to set the terms and conditions of public employment.¹⁰ We submit that these decisions, especially read with *Hanson*, require a negative answer to the question at bar, whether the Constitution prohibits the states from authorizing contracts which require each public employee to share in the costs of the collective bargaining process which the states require the bargaining representative to conduct on his behalf and to his benefit.

B. *Hanson* Upheld the Rule, Later Perfected in *Street* and *Allen*, That All Employees who Reap the Benefits of the Statutory Collective Bargaining System May Be Required To Share its Costs.

In *Railway Employees Department v Hanson*, 351 US 225 (1956), this Court unanimously upheld section 2, Eleventh of the Railway Labor Act, which authorizes labor agreements requiring every employee to tender "the periodic dues, initiation fees and assessments . . . uniformly required as a condition of acquiring or retaining membership." Appellants would distinguish *Hanson* as a mere "private sector" case; there was no genuine "state action"

¹⁰ Pertinently, *Oil, Chemical and Atomic Workers, International Union, AFL-CIO v Mobil Oil Corporation*, — US —, 44 LW 4842 (1976), interpreting the National Labor Relations Act, also spoke in the last term of a federal policy favoring union security agreements and permitting the parties to a collective bargaining agreement "to provide that there be no employees who are getting the benefits of union representation without paying for them." 44 LW 4842, 4845. (Emphasis added)

in that case, they say, because the federal statute only permits but does not require agreements requiring financial support by employees. Appellants' "state action" disclaimer flies in the face of this Court's express ruling in *Hanson*. Agreeing with the lower court that constitutional issues were presented because the "permissive" federal statute strikes down inconsistent state laws, this Court stated the following:

"The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein'. . . We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. Cf *Smith v Allwright*, 321 US 649. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed.⁵ Cf *Steele v Louisville & N R Co*, 323 US 192, 198-199, 204, *Brotherhood of Railroad Trainmen v Howard*, 343 US 768, *Public Utilities Commission of District of Columbia v Pollack* 343 US 451, 462. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.'" 351 US 225, 231.¹¹

⁵ "Once courts enforce the agreement the sanction of government is, of course, put behind them. See *Shelley v Kraemer*, 334 US 1; *Hurd v Hodge*, 334 US 24; *Barrows v Jackson*, 346 US 249."

¹¹ Appellants' disclaimer of "state action" not only contradicts such express ruling in *Hanson*, but, in turn the assumption which underlay this Court's later rulings in *Street* and *Allen*. If, as contended, *Hanson* was merely a "private sector" case, declaratory of common law rights, then the parties and this Court in *Street* and *Allen* were needlessly exercised about the asserted political consequences of "private" behavior.

Thus, there was clearly "state action" in *Hanson*, and it was action which this Court (at 238) upheld as consistent with the First and the Fifth Amendments: "[T]he requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or Fifth Amendments." The rationale for that conclusion was stated (at 234-35) in terms no less applicable in the present case:

"It is said that the right to work, which the Court has frequently included in the concept of 'liberty' within the meaning of the Due Process Clauses (see *Truax v Raich*, 239 US 33; *Takahashi v Fish & Game Commission*, 334 US 410), may not be denied by the Congress. The question remains, however, whether the long-range interests of workers would be better served by one type of union agreement or another. That question is germane to the exercise of power under the Commerce Clause—a power that often has the quality of police regulations. See *Cleveland v United States*, 329 US 14, 19. One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. See Webb, *History of Trade Unionism*; Gregory, *Labor and the Law*. To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. The only conditions to union membership authorized by ¶ 2, Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required relates, therefore to the work of the union in the realm of collective bargaining."

Machinists v Street, 367 US 740, further perfected the underlying principle. It declined to approve compulsory financial support by employees to the union's expenditures in the areas of politics, wherein each employee maintains his individual option of support or abstention. In *Street* (at pp. 768-769) this Court reconciled the union shop clause of the Railway Labor Act with the First Amendment, by construing it so as to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." On the other hand, it was emphasized (p. 771) that "the union-shop agreement itself is not unlawful." Accordingly, the lower court's injunctive interference with union dues collection from all employees was reversed because it defeated "the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining'" (p. 772). Thus federal law now permits a requirement that employees pay the costs incurred by their collective bargaining representative other than the costs of political expenditures unrelated to collective bargaining.

These principles were fully reaffirmed and reapplied in *Allen*, 373 US 113 (1963).

In sum, this Court upheld in *Hanson*, and perfected in *Street* and *Allen*, a basic principle of labor relations which has had national operation for over forty years. That is the principle under which every employee benefiting from the exclusive statutory bargaining process may be required to contribute to its costs. That rule, first given statutory recognition in the National Labor Relations Act, is the one by which all our political institutions have historically operated. When Congress in the NLRA and RLA adopted employee self-government in labor relations, and approved pro-rata taxation for its costs, it was replicating the prin-

ciple long operative at every level of our government systems. A citizen, as long as he remains a member of the community, must pay his share of its governance costs, local, state and federal. His personal agreement with the expenditures of taxes is not a condition of his duty to pay.

An analogy which further confirms the cost sharing concept is found in the accepted rule which requires members of the Bar to belong to a Bar Association and pay pro-rata dues for the support of its functions. That rule was given extensive examination by this Court in *Lathrop v Donahue*, 367 US 820 (1961). Members of this Court were divided on the question there presented, concerning the extent to which the Bar Association's political activities could be taxed to every member. But significantly, the Justices agreed that except for the limits of compulsory payment in the political area, the underlying rule of pro-rata contribution by Bar members is not subject to Constitutional question. The plurality opinion was emphatic in upholding the rule, applicable to attorneys, that costs of improving the profession "should be shared by the subjects and beneficiaries" thereof. And "in light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association" (367 US at 843). Notwithstanding the disagreement over compulsory payments for the political activities of the Bar, no member of this Court questioned the proposition that attorneys may be required to pay for its non-political expenditures. Where those cover activities yielding gain to the members, even Mr. Justice Douglas agreed that they may be taxed to the entire membership. (See *infra*, p. 39, n. 31). Thus there can be no serious question about the prevailing rule, by which states require attorneys to belong to the Bar Asso-

ciation and to pay for its costs. And we discern no meaningful difference between that rule and this rule requiring public employees to pay pro-rata for the state-mandated activities of their bargaining representative. Indeed, the present rule is actually less restrictive—whereas the law applicable to attorneys requires them not only to pay for the Bar Association activities but actually to become its members, the agency shop allows the employee only to pay his pro-rata share without actually becoming a union member and subjecting himself to union rules and discipline.¹²

In sum, the principle upheld in *Hanson*—that all employees must share the costs of the union's collective bargaining for all employees—is simply the principle which operates throughout our society. It is no less applicable, we proceed to show, to collective bargaining in public employment than in private employment, where this Court has unequivocally held that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work . . . does not violate either the First or Fifth Amendments." 351 US at 239.

C. The Compulsory Support Rule Approved in *Hanson* is Equally Justified in Public Employment Bargaining.

1. *Michigan, like more than forty states, has adopted the federal model of exclusive and fair representation, with its significant costs and benefits.*

¹² Reliance by appellants (brief, p. 106) on prior decisions of this Court, *NLRB v General Motors Corp*, 373 US 734 (1963), and *Retail Clerks v Schermerhorn*, 373 US 746 (1963), to contend that an agency shop agreement is the "practical equivalent" of a union shop agreement is totally misleading. For that was held true not because a requirement to pay a service fee is the equivalent of union membership, but on the contrary because a union membership requirement is itself interpreted under NLRA, §§8(a)(3) (proviso) and 14(b), only to require the payment of dues. In other words, the union membership requirement of the National Labor Relations Act has been whittled to its "financial core." *NLRB v GM*, *supra*, at 742.

Over the last two decades there has been a revolution in public sector labor relations, based on the compelling premise that, "a government which imposes upon private employers certain obligations in dealing with their employees, may not in good faith refuse to deal with its own public servants on a reasonably similar basis."¹³

Beginning with Wisconsin in 1959, Massachusetts in 1960, and Michigan in 1965, at least 40 states and the District of Columbia have adopted labor relations laws (by statute, executive order, and/or regulation) governing their public sector employees.¹⁴ Five more states, by court decision or attorney general opinion, have sanctioned public sector collective bargaining without the necessity of legislation.¹⁵

There has also been a great upsurge in public sector labor organization. The U. S. Department of Labor, Labor-Management Services Administration, Division of Public Employee Labor Relations, recently stated:

"In recent years the level of public employee labor relations activity has increased dramatically. In October 1973, there were 14.1 million public employees, an increase of more than one half million over the previous year. Not only have the ranks of public employment continued to swell, but the extent of organization has also been growing at an even faster rate. Since 1960, membership in public sector

¹³ 1955 Proceedings of the American Bar Association, Section of Labor Relations Law, Report of Committee on Labor Relations of Governmental Employees, 89-90.

¹⁴ See Appendix A-1. There have been similar federal developments, beginning with President Kennedy's seminal Executive Order 10988 for federal employees (3 CFR 521 (Comp. 1959-1963), 5 USC §631 (1964)), issued January 17, 1962; later updated by President Nixon's Executive Order No. 11491 as amended (October 29, 1969, 34 FR 17605; EO 11616, August 26, 1971, 36 FR 17319; EO 11636, December 24, 1971, 36 FR 24901; EO 11838, February 6, 1975, 40 FR 5743; EO 11901, January 30, 1976, 41 FR 4807).

¹⁵ See Appendix A-2.

unions and employee associations has more than doubled to almost five million. Today, about one third of the public employee work force is organized, compared to the private sector's organizational level of one quarter. As can be expected, the development of legislative and policy decisions and guidelines has also accelerated with this dynamic growth. More states have taken it upon themselves to enact laws or establish administrative policies to promote harmonious labor relations across the country." Summary of State Policy Regulations For Public Sector Labor Relations (1975).

The state enactments have typically taken as their model the National Labor Relations Act, including particularly its principle of exclusive representation founded on majority rule, which has repeatedly been held to be central to the national labor policy, *NLRB v Jones & Laughlin Steel Corp*, 301 US 1 (1937); *J I Case Co v Labor Board*, 321 US 332 (1944); *NLRB v Allis Chalmers Mfg Co*, 388 US 175 (1967); *Emporium Capwell Co v Western Addition Community Organization*, 420 US 50 (1975), and its principle of the bargaining agent's correlative duty of fair representation to all members of the bargaining unit, whether members of the union or not. *Steele v Louisville & NR Co*, 323 US 192 (1944); *Ford Motor Co v Huffman*, 345 US 330 (1953); *Syres v Oil Workers International Union*, 350 US 892 (1955); *Humphrey v Moore*, 375 US 335 (1963); *Vaca v Sipes*, 386 US 171 (1967); *Hines v Anchor Motor Freight*, — US —, 44 LW 4299 (1976).

Michigan obviously subscribes to these views. Its Public Employment Relations Act (PERA) was signed into law by Governor Romney on July 23, 1965 (1965 PA 379, MCLA 423.201 *et. seq.*, MSA 17.455(1) *et. seq.*). As adopted, the Act guaranteed Michigan public employees in the local

sector (but not State classified employees, because of a State constitutional exemption) the familiar rights of self-organization, (MCLA 423.209, MSA 17.455(9)), collective bargaining (MCLA 423.215, MSA 17.455(15)), secret ballot representation elections (MCLA 423.212, MSA 17.455(12)), and exclusive representation (MCLA 423.211, MSA 17.455(11)), etc.

The Michigan Supreme Court has noted that the Michigan Act is "modeled on the National Labor Relations Act (NLRA)," *Rockwell v Crestwood School District Board of Education*, 393 Mich 616, 635-636 (1975), appeal (on other grounds) dismissed for want of a substantial federal question, *sub. nom. Crestwood Education Association v Board of Education of School District of Crestwood*, — US —, 44 LW 3747 (1976); *Detroit Police Officers Association v City of Detroit*, 391 Mich 44, 53 (1974); *Michigan Employment Relations Commission v Reeths-Puffer School District*, 391 Mich 253, 260, 215 NW2d 672 (1974); that federal precedents construing analogous NLRA provisions are persuasive, *Rockwell, supra*, 393 Mich 616, 635-636; and that the Public Employment Relations Act is the "dominant [Michigan] law regulating public employee labor relations," *id.*, 393 Mich 616, 629, citing *Detroit Police Officers Association, supra*; *Regents of the University of Michigan v Employment Relations Commission*, 389 Mich 96, 204 NW2d 218 (1973) and *Wayne County Civil Service Commission v Board of Supervisors*, 384 Mich 363, 184 NW2d 201 (1971). The Court has stated that in adopting the federal model for the collective bargaining responsibilities imposed by the Act, the legislature "made the judgment that Michigan's public employees should enjoy * * * many of the rights and kinds of contractual benefits gained by workers in private employment by the collective bargaining proc-

ess.' " *Detroit Police Officers Association v Detroit, supra*, 391 Mich 44, 59 (1974).

The Michigan Supreme Court has made clear that the fanciful version of individual teachers' power to order their own affairs which appellants tender to this Court is now—and always has been—fiction. In a recent decision involving this very bargaining unit, *Detroit Federation of Teachers v Detroit Board of Education*, 396 Mich 220, 240

W2d 225 (1976), the Michigan Supreme Court, in holding that although the Michigan School Code provides for individual employment contracts with teachers the terms thereof are governed by the master contract negotiated by the collective bargaining representative,¹⁶ noted (p. 225): "Before teachers unionized, the terms of a teacher's employment were set forth in a contract between the teacher and the board embodying their agreement. Few individual teachers, however, had any real bargaining power and the contract terms were frequently imposed by the board rather than negotiated by the parties." The Court also observed that, "Now the union and the board negotiate a master collective bargaining agreement which determines the rights of the individual teachers in the bargaining unit." (*id.*)

Under the Michigan law, it is such traditional collective bargaining functions in which public employee unions engage. They achieve, maintain and service bargaining agreements. They annually handle thousands of inquiries and complaints concerning pay, working conditions, class size, work assignments, overtime, seniority, certifications, tenure, layoffs, terminations, discipline, transfers, promotions, evaluations, insurance, retirement, illness, disability, substitute support, scheduling, supplies and equipment, and the like. If meritorious complaints can-

¹⁶ Cf. *J I Case Co v Labor Board*, 321 US 332 (1944).

not be resolved, they may ripen into formal "grievances" and later into arbitration proceedings. Hearings are required before the school board, arbitrators, labor relations boards, tenure commissions, retirement commissions, civil rights commissions, other agencies and the courts. Litigation may occur over alleged unfair labor practices, the board's contracting responsibilities under the school code, the enforcement of contracts and awards, desegregation claims, the defense of unfair representation claims, and such suits as this. The union must work through scores of liaison committees, with the board, the community, parent-teacher groups and countless other agencies, public and private. It must counsel, inform, educate, train and otherwise assist its members in their rights and responsibilities. It must sponsor or participate in workshops, in-service training and the like. It must constantly engage in research on the effect of legislation on bargaining unit members. It must be prepared to refer members to outside agencies for assistance. In a decentralized school district like Detroit's it must engage in each of these functions on a multiplied basis in each of the subordinate school districts. It must communicate with teachers. And of course periodically—generally annually—it must engage in the massive project that is known as negotiations for a new contract, involving months of effort, research, organization and the like.

All of these services, in this 11,000 employee bargaining unit, of course cost money—a lot of it—to cover the salaries of 17 full-time (professional and non-professional) staff employees of the defendant Union; to cover housing, heat, electricity, telephone, fuel and water bills; to pay for supplies and equipment; to pay "per capita" taxes to parent organizations for support services. The costs come high, as well, for lawyers, accountants, arbitrators, court report-

ers and the like. The fact is that the defendant Federation has an annual operating budget exceeding \$1 million, and in its last reported fiscal year (1974-75) incurred an operating deficit of approximately \$100,000. For all of these costs the union has essentially been dependent on dues, which have generally averaged less than one percent of employee salaries.¹⁷ Consistent with the requirements of Michigan law, such costs are incurred by the union for the benefit of all employees including appellants.¹⁸

The results in Michigan under PERA have been dramatically beneficial to all teachers;¹⁹ for it is only in recent

¹⁷ The current dues and agency fee rates are as follows: 1.2% (or less, for substitute teachers and certain lower paid job classifications) of the scheduled *minimum* salary for teachers with a B.A. degree; namely, \$108.70 per year, or \$6.04 biweekly, for teachers earning \$10,308-\$14,287 per year; or \$123.70 per year, or \$6.87 biweekly, for teachers earning \$12,965-\$21,055 per year. The average effective rate for agency shop payers is less than 1%. Members, but not agency shop payers, are also required to pay an additional \$4.50 annual building assessment.

¹⁸ The Federation as exclusive bargaining agent owes to appellants and all other bargaining unit members a duty of fair representation both in the negotiation and administration of contracts, for the doctrine of fair representation is applied by the Michigan courts, *Lowe v Hotel and Restaurant Employees Union*, 389 Mich 123, 205 NW2d 167 (1973); *McGrail v Detroit Federation of Teachers*, 82 LRRM 2623 (Wayne Circuit Court, 1973), *aff'd* Michigan Court of Appeals, No. 16493 (1974); *Oakland County Sheriff's Dept*, 1968 MERC Lab Op 1(a); and according to a recent decision of the Michigan Court of Appeals, more demanding than in the federal courts. *Handwerk v United Steelworkers of America*, 67 Mich App 747, — NW2d — (1976).

¹⁹ A study by Professor Charles M. Rehmus, Professor of Political Science at the University of Michigan and Co-Director of its Institute of Labor and Industrial Relations, concluded that in 1966-67, following the advent of PERA, teachers who engaged in collective bargaining got salary increases averaging 10 to 20% higher than they would have gotten without collective negotiations. Rehmus and Wilner, *The Economic Results of Teacher Bargaining: Michigan's First Two Years* (1968). Later studies have concluded that "unionization in both the public and private sectors probably gives a permanent relative advantage to the organized." *Teacher Bargaining*, 25 *Research News*, Div. of Research Development Administration, University of Michigan, No. 12 (June, 1975).

years that teachers and other public employees have won, through collective bargaining, pay scales which begin to be comparable to those in the private sector. Moreover, the unprecedented annual inflation rates of recent years have posed special problems for public employees, because the legislative and tax processes and referenda tend to lag behind the inflation rates and thus leave the public employee with diminished purchasing power. Yet under the contracts bargained for them, appellants have achieved a measure of earning security through successive contracts which have provided substantial annual pay increments. Thus salaries have increased for starting teachers (B.A. minimum) from \$5,250 per year in the fall of 1964 (the first semester after the Union obtained *de facto* bargaining rights, about a year before PERA was adopted) to \$10,308 for the fall of 1976, an increase of \$5,058, or 96%. The increase for the M.A.-maximum teacher has been from \$8,600 in the fall of 1964 to \$20,055 in the fall of 1976, an increase of 133%. The Consumers Price Index for Detroit (commonly referred to as the cost of living) has increased by 86% over approximately the same period (91.0 in September, 1964 to 169.2 in July, 1976). Thus, the Union's bargaining has kept pace with inflation and brought the teachers from a general condition of underpayment to earnings more nearly commensurate with their skills, training and experience.

In addition to achieving contract benefits,²⁰ the collective bargaining system has also yielded substantial protections and benefits in its grievance-arbitration process. Under the collective bargaining agreement, employee complaints

²⁰ Such benefits have been both economic—including a number of fringe benefits, such as greatly improved health and life insurance benefits—and non-economic—such as reduced class sizes and greater protections against unjust terminations and discipline.

about the application or interpretation of the agreement are processed (initially by the employee, and later by Union representatives) as "grievances" to successively higher administrative levels of the employer and, if not sooner resolved, to terminal disinterested arbitration under the auspices of the American Arbitration Association. The grievance procedures have been successfully invoked by the Union, *inter alia*, on behalf of various plaintiffs in this suit, at their request, for such diverse matters as rectifying a transfer for alleged insubordination, an allegedly improper discharge, over-sized classes, inappropriate work assignments, and a refusal to permit return from leave, etc.

The grievance and arbitration process is costly. The latest arbitration case concerning a single employee's discharge has already cost the Union \$12,710 (for arbitrator's, attorneys', court reporters' and directly related staff fees, but not including general overhead). An earlier arbitration case challenging allegedly oversized classes cost \$14,327. And an "interest" arbitration, to establish salaries and class sizes, cost the Union at least \$34,075.

These were the economic realities in 1973 when the Michigan Legislature adopted Act 25, explicitly authorizing agency shop agreements with the stated purpose (*supra*, p. 5) to "reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative."

2. *Michigan, like approximately a third of the states, has also appropriately authorized financial support requirements for the bargaining process, which process is essentially economic, not "political."*

Michigan is not alone. Of the 40 states which have adopted public sector collective bargaining laws, at least 16 jurisdictions (as well as the District of Columbia) and perhaps as many as 19 have also authorized union security provisions.²¹ Typically these require that all members of the bargaining unit as a condition of employment pay to the bargaining agent either union dues or equivalent fees. While generally the statutes authorize the employer and union to negotiate such clauses, at least five states, Connecticut, Rhode Island, Hawaii, Minnesota and Washington actually mandate union security.²² As noted by expert observers of these developments:

²¹ See Appendix A-3. In addition to the 15 states and the District of Columbia which expressly authorize agency shop agreements, and Pennsylvania, which authorizes maintenance-of-membership clauses, at least three more states arguably permit agency shop agreements under general bargaining laws absent any prohibitions to the contrary: New Hampshire, Indiana and Idaho. See *Tremblay v Berlin Police Union*, 108 NH 416, 237 A2d 668 (1968); but see *Hayward v United Public Employees, Local 390 of the Service Employees Int'l Union, AFL-CIO*, 54 Cal App 3d 761, 126 Cal Repr 710 (1976); *Smigel v Southgate Community School District*, 388 Mich 531, 202 NW2d 305 (1972); and *Farrigan v Helsby*, 42 App Div 2d 265, 346 NYS2d 39 (1973).

²² Appendix A-3. Hawaii and Minnesota require a request by the union; as does Washington (some employees), after certain conditions are met. Appellants' contention that certain states leave the implementation of agency or union shop "to the caprice of the employer and the union" (brief, 129) is just a misstatement of the fact that in the states which authorize the agency shop, union security, like other contract provisions, is subject to good faith bargaining. See, e.g., *Massachusetts Nurses Association v Lynn Hospital*, — Mass —, 306 NE2d 264 (1974). That does not reflect a legislative judgment that union security is not vital, as urged by appellants, only that the parties' mutual interests can best be served through the bargaining process. *Linscott v Millers Falls Co*, 440 F2d 14, 18 (CA 1, 1971), cert den 404 US 872 (1971). Appellants' analysis also erroneously includes West Virginia and excludes Maine among states which expressly allow public sector agency shop agreements. Further, Washington is properly classified as subject to varying provisions, depending on the type of employees involved; see Appendix A-3.

"[T]he same reasons that justify legislation authorizing agreements between unions and private employers for the discharge of employees who fail to contribute at least some money to the support of their bargaining agent apply equally well where a government employer is involved. These reasons are two-fold. First, under the predominant type of state public employee bargaining legislation, as well as under the NLRA and RLA, a union selected as bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit—union and nonunion alike—in a nondiscriminatory manner. Unless the employees in the unit who remain nonunion can be compelled to contribute to the costs of union representation, which may be considerable, the nonunion employees will enjoy the benefits of the bargaining process while union members are forced to assume the entire burden of paying for it. Second, since the union members in a bargaining unit may be unable to finance adequately the negotiation and administration of a collective bargaining agreement without some monetary contribution from the nonunionists, the resulting financial instability of the duly-elected bargaining agent may jeopardize meaningful collective bargaining by encouraging the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support." Blair, *Union Security Agreements in Public Employment*, 60 Cornell L Rev 183, 189-190 (1975).

Others agree. See, Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 Cornell L Rev 547 (1970);²³ Gromfine, *Union Security Clauses in Public*

²³ "One desirable way to enhance union responsibility is to adopt an appropriate form of union security agreement. Such arrangements prevent the nonunion employee from sharing in the benefits resulting from union activities without also sharing in the obligations. In addition the security agreement stabilizes the bargaining

Employment, 22nd NYU Conference on Labor, 285 (1969).²⁴
See also, Wellington and Winter, *The Unions and the Cities*, 96, (1971).²⁵

Surely if the states are free to adopt the federal model of majority rule and exclusive representation (which appellants do not challenge) and to require of the bargaining agent the duty of fair representation (which appellees concede), they are equally free to require, as a concomitant, the employees' uniform financial support of bargaining costs. This is particularly true where it is the legisla-

relationship by providing security from attack by rivals and enables union leaders to devote more attention to bargaining and administration of collective agreements." 55 Cornell L Rev 547, 547-548.

²⁴ "It is a fact, frequently ignored by both friend and foe of collective bargaining that the strike is very often a manifestation not of the strength of a union, but rather of its weakness. This is particularly true in a sector of the economy where collective bargaining is just emerging and has by no means met with universal acceptance. In such a situation, strikes will arise as much from the inability of the union to maintain effective control over the employees in the bargaining unit or the need of the union to develop solidarity through strife, as they will from substantive impasses in bargaining. In my judgment, no solution that may be proposed to the central question of strikes and alternative measures of resolving labor disputes in the public sector has any reasonable chance of success unless it contemplates the existence of unions in that sector that are strong and secure, unions that, by virtue of their strength and security, are free to act, and have the wherewithal to act, with a full measure of responsibility. It must have the security and policy making stability that flow from the fact that policy and strategy decisions affecting all employees in the bargaining unit have been sanctioned by a union membership that is as close as possible to being coextensive with the bargaining unit. It must also have the financial stability that flows from the fact that the costs entailed in exercising its responsibilities, as the bargaining representative for all employees in the bargaining unit, are being shared by all employees in that unit." At 287-288.

²⁵ "The union security issue in the public sector seems overblown in the sense that it is fundamentally the same issue, with the same merits or demerits, as in the private sector . . . No special dimension results from the fact that a union represents public rather than private employees."

tive judgment, founded in the national experience and supported by scholars, that the *employer* benefits through stability in labor relations. In the public sector, no less than in the private one where *Hanson* has confirmed compulsory dues support, the agency shop is an appropriate compromise between a "free rider" system which would require a portion of the employees to pay the collective bargaining costs of all, and a "compulsory membership" system which would require employees to associate themselves with the union and become subject to its rules.

Seeking to avoid the force of the accepted rule, appellants offer the purported distinction that public employee bargaining is inherently "political," and therefore all union security must be proscribed in the public sector under the rule of *Street* and *Allen*. But appellants offer nothing but rhetoric to support their sweeping claim. Far from being "political," public employment bargaining is a close approximation of the collective bargaining system as it operates in the private sector—as over 40 states and the District of Columbia have intended it to be.²⁶ To put it another way, the process of settling employment conditions through collective bargaining is not transmuted from economic into "political" activity merely because the employer is a public agency rather than a private party. Concededly, budgetary and tax consequences are involved

²⁶ Wollett, cited by appellants (brief, 182) concludes that, "Most public employee unions, even those which are professional in nature, do not think of collective bargaining primarily as a vehicle for social change * * * Public employees, including those whose responsibilities and skills are professional or quasi-professional, think of collective bargaining primarily as a vehicle for protecting and advancing their interests as an employed occupational group." At 375, in Smith, Edwards and Clark: *Labor Relations Law in the Public Sector* (1974).

in the terms agreed upon by a public agency in its collective bargaining contract (or, for that matter, in any other contract to which it agrees). But, it is the public *employer*, rather than the public employee *union*, whose bargaining posture is significantly affected by budget and tax considerations. On the union side the process is essentially the same economic exercise as in the private sector.²⁷

Moreover, to say even with respect to the public *employer* that the process is inherently "political" and therefore beyond its authority, is to say that the "fundamental attribute of state sovereignty" which this Court just identified in *National League of Cities* as within the states' "otherwise plenary authority" precisely *because it dealt with labor relations*, 44 LW 4974, 4977, would on that very account be withdrawn from the states.

Appellants rely on several writers — frequently misquoted or quoted out of context²⁸ — to support their simplistic "public equals political" assertion. But, as appellants concede (brief, 65), responsible commentators in the field are virtually unanimous in urging collective bargaining in the public sector based on the national model. Indeed, appellants' counsel has acknowledged elsewhere that he

²⁷ Ironically, appellants would regard the railroad industry, involved in *Hanson*, as merely the "private sector," untouched by their arguments. Yet, few others would doubt the "public interest" with which that industry is affected, as evidenced in part by the alacrity with which efforts are made to terminate railway strikes.

²⁸ For example, Spero and Capozzola, *The Urban Community and Its Unionized Bureaucracies: Pressure Politics In Local Government Labor Relations* (1973), say that municipal collective bargaining "reflects the coloration of municipal politics" (p. 312), with political activities by unions frequently supplementing collective bargaining as such, but they reject the public-private dichotomy as unrealistic, asserting there are more similarities than differences between public and private employees. Moskow, Loewenberg and Koziara, *Collective Bargaining in Public Employment* (1970), speak of public sector collective bargaining occurring "in a political environment," 252, not that collective bargaining is an in-

stands virtually alone in his views to the contrary.²⁹ Counsel's present claim that public employee bargaining is "political" rather than economic in character, is simply advocacy of a general antipathy to the process approved by some 45 states of the Union.

Professor Clyde W. Summers, whom appellants cite and who is conceded by them to be a distinguished commentator in the field, does not at all support the sweeping conclusion being offered by appellants. Professor Summers frontally challenges the claim "that collective bargaining in the public sector is inappropriate or that practice in the private sector cannot be transplanted to the public sector. Collective bargaining in both sectors is a process for determining terms and conditions of employment and it might serve both the

herently political process as such. Mosher, *Democracy and the Public Service* (1968), is misquoted at note 20, p. 65, of appellants' brief as saying that "Public-Sector bargaining 'more nearly resembles standard interest-group tactics.'"; in fact, in the referenced sentence, Mosher is not referring to collective bargaining as it is commonly known, but to what he calls "bargaining," in quotation marks, in the state legislatures and Congress. At 188.

²⁹ See Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 Wake Forest L Rev 25 (1974), particularly pp. 26-27, 43, 48:

"* * * contributors to the voluminous scholarly literature on the subject have been virtually of a single mind. One searches in vain among recent law review articles for a commentator who opposes these trends; not a one has stated in print that the irreconcilable conflict between meaningful sovereign government and meaningful public-sector collective bargaining should be resolved in favor of the former. * * * The law review writers typically put the word 'sovereignty' in quotation marks and then as a rule move swiftly to the conclusion that compulsory public-sector bargaining laws are justified—or even necessary—'on the private-sector analogy.'"

"... dominant current opinion approves extension to the public sector of the kind of compulsory collective-bargaining legislation which has been applied to the private sector for the last forty years or so."

"While today virtually all commentators in the learned journals, many judges, and enormous numbers of political figures (federal, state, and local) are in favor of bringing compulsory collective bargaining to government employment . . ."

private and public decision making processes equally well in similar, or even quite different ways. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L J 1156-1157 (1974). Far from characterizing the public employee union's bargaining as political, Professor Summers views the process as necessary to counteract the political pressure upon the *other* party at the bargaining table—pressure on the employer to resist concessions to employees which may increase taxes.³⁰ The employees' collective bargaining power is seen as necessary "to give them an ability to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services". Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 Cincinnati L Rev 669, 675 (1975).

What Professor Summers thus supports is not at all appellants' claim that the achievement of a contract by the public employee union is an exercise in politics rather than bargaining. It is the quite different proposition that a government agency, the opposing party at the table, is

³⁰ "Viewing public employee bargaining from the political perspective gives no guarantee of simple or secure answers—quite the contrary." *Id.*, at 1158. "Introduction of collective bargaining into the public sector alters the governmental process, creating within that process special procedures for making decisions about the wages and working conditions the public will give its employees. This is, of course, no argument against public employee bargaining, unless there is some predisposition against innovations in government. There is no immediately evident reason for assuming that customary or preexisting processes are best, or even adequate, when the decision to be made by the public is the special one of how much the public will pay its servants. On the contrary, the fact that the economic interests of the voting public, both as taxpayers and as users of public services, run directly counter to the economic interests of public employees in wages and working conditions suggests that public employees may need special procedures to insure that their interests receive adequate consideration in the political process." *Id.*, 1160-1161.

influenced in its bargaining posture by public policy considerations and by its estimate of the taxpayers' tolerance limits. Nothing in that proposition suggests that the public employee who is required to share the costs of collective bargaining is paying for political activity, such as was in view in *Street* and *Allen*, rather than for the economic bargaining function involved in *Hanson*.

Finally, appellants' frequent reliance on opinions of Mr. Justice Douglas is quite misplaced. While those opinions strongly support freedom from compulsory political activity or expenditures, they also fully accept the majority rule system and its corollary of pro-rata taxation of the members. That premise of Mr. Justice Douglas' opinion for the unanimous Court in *Hanson* was reemphasized with particular present pertinence in his opinion in dissent in *Lathrop v Donohue*, 367 US 820, 877.³¹

"We dealt [in *Hanson*] only with a problem in collective bargaining, viz., is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those

³¹ Justice Douglas emphasized that the issue in *Lathrop* involved Bar Association promotion of causes from which the attorney "obtains no gain and which is not part and parcel of service owing litigants or courts" (at p. 881). Nevertheless, the opinion underscored (*id.*) the different result where the lawyer's gain or obligations are involved:

"If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers, the present objection might not be relevant. In that case, one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. *In re Florida Bar*, (Fla) 62 So 2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public." At 881.

who are free riders may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. *The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.*" (emphasis added).

There is no valid distinction between public employment and private employment where *Hanson* upheld the principle of pro-rata contributions for collective bargaining costs.

D. Pro-Rata Payments By Each Employee Toward the Cost of Bargaining Do not Constitute "Association" Subject to First Amendment Restraints, And Are In Any Event Consonant With the Requirements of That Amendment

Thus far, we have demonstrated that *Hanson* (and *Lathrop*) recognize that in bargaining and analogous contexts a government may foster or direct the sharing of at least the costs of the non-political activities of an organization among the beneficiaries of those activities, and that since the purposes of an agency shop clause in the public sector are basically the same as those served by the cost-sharing principle in *Hanson*, such a clause is equally valid when applied to public employees. *Hanson* and *Lathrop* rest on the proposition that at least insofar as political activities are not involved, no First Amendment rights whatever are implicated by requiring such payments. As expressed in *Lathrop*, 367 US at 828, 842:

"We therefore are confronted, as we were in *Railway Employees' Dept v Hanson*, 351 US 225, only with a question of compelled financial support

of group activities, not with the involuntary membership in any other aspect. . . . We . . . held [in *Hanson*] that §2, Eleventh of the Railway Labor Act . . . *did not* on its face *abridge protected rights of association* in authorizing union shop agreements." (emphasis added)³²

The "association with the Union" against which appellants complain involves nothing less than their opposition to the collective bargaining relationship as such. That relationship results not from the service fee requirement but simply from the statutory system of collective bargaining. That system in Michigan stipulates that one who has chosen public employment becomes a member of a bargaining unit if a majority of employees have opted for collective bargaining. It is surely too late in the day to question the constitutional validity of such a system, long ago legislated by the Congress and the states and long ago upheld by this Court on account of the compelling purposes it serves, *NLRB v Jones & Laughlin Steel*, 301 US 1 (1937); *NLRB v Allis-Chalmers Mfg Co*, 388 US 175 (1967); *Vaca v Sipes*, 386 US 171 (1967); *Emporium Capwell Co v Community Organization*, 420 US 50 (1975).³³

³² See also *Hanson*, 351 US at 238. Cf. *City of Charlotte v Fire Fighters*, — US —, 44 LW 4801, where the Court stated that it "would reject . . . if it were made [the contention] that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause." Since distinctions which implicate rights protected under the First Amendment *do* require such scrutiny under the Equal Protection Clause [see, e.g., *Police Department v Mosely*, 408 US 92 (1972)] we take the Court's observation in *City of Charlotte* to mean that the decision either to facilitate or fail to facilitate the finances of an organization do not, without more, constitute an impediment to association, cognizable under the First Amendment.

³³ As stated in *Allis-Chalmers* (p. 180):

"National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an

Even if this case were analyzed, however, on the assumption that First Amendment associational interests *are* implicated by an agency shop clause for public employees, the same result—upholding the authority of the state to require such payments—would follow.

This Court has particularly emphasized that the constitutional duties of a public employer *qua* employer to its employees are significantly less than to citizens at large, *Pickering v Board of Education*, 391 US 563, 568 (1968); *Civil Service Commission v Letter Carriers*, 413 US 548 (1973); *Broadrick v Oklahoma*, 413 US 601 (1973), and the many cases of this past term, part II-A, *supra*. The decision in *Letter Carriers*—the most important recent case in this Court involving the balance to be struck between the associational rights of public employees and the government's interests in limiting such rights—leads inescapably to the conclusion that an agency shop clause for public employees is constitutional.

Letter Carriers involved the Hatch Act prohibition upon involvement of federal employees in partisan political activities. The right of citizens generally to participate in such

appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . .'
Steele v Louisville & NR Co, 323 US 192, 202. Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievance; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them. 'The majority-rule concept is today unquestionably at the center of our federal labor policy.'

activities, and to associate with others to do so, is, of course, at the very core of the First Amendment. *Buckley v Valeo*, — US —, 44 LW 4127, 4131 (1976); *Cousins v Wigoda*, 419 US 477, 487 (1975); *Kusper v Pontikes*, 414 US 51, 56, 57 (1973). And the infringement upon that right in *Letter Carriers* was direct and severe: federal employees under the Hatch Act are entirely prohibited from, among other things, "[o]rganizing or reorganizing a political party organization or political club"; "[t]aking an active part in managing the political campaign of a partisan candidate for public office or political party office"; "[s]oliciting votes in support of or in opposition to a partisan candidate for public office or political party office"; "[s]erving as a delegate, alternate, or proxy to a political party convention"; [and] "[i]nitiating or circulating a partisan nominating petition" (*id*, at 576 n. 21), all rights basic to the political process and indubitably protected as to the populace generally.

The Court approached the question in *Letter Carriers* from the premise that, "Neither the right to associate nor the right to participate in political activities is absolute . . ." (*id*, at 567), and concluded that the "'balance between the [First Amendment] interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the [government], as an employer, in promoting the agency of the public service it performs through its employees' . . . is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities . . ." *id*, at 564, quoting *Pickering v Board of Education*, 391 US 563, 568.³⁴ In reaching

³⁴ The "important" interests identified were the interests in: (1) impartial execution of the laws; (2) the appearance of impartial execution; (3) preventing the building of a powerful political

its conclusion, the Court gave deference to the legislative judgment: "Perhaps Congress at some time will come to a different view of the realities of political life and government service, but that is its current view of the matter, and we are not now in any position to dispute it." 413 US at 548.

The First Amendment interest claimed to be infringed here is plainly of a lesser order than that involved in *Letter Carriers*. Appellants are not, on the one hand, as the federal employees in *Letter Carriers* were, prevented from participating to any extent they choose in organizations political or otherwise which attempt to forward appellants' own views and interests, including organizations which oppose directly the position adopted by the Union chosen by a majority of their fellow employees. And, on the other hand, they need not join, attend meetings or otherwise participate in, or be bound by the internal rules of the exclusive bargaining representative. Moreover, they are not obliged under the holding under review nor under the constitution of the Union to support financially any political activities of the Union. The claimed associational right here therefore reduces to the right of an individual not to support an agency to perform a service—here the setting and enforcing of wages, hours and working conditions—on behalf of a group—here teachers employed by the School Board—with which that individual *has* chosen to associate.

The governmental interests opposed to this at best highly attenuated First Amendment right discussed above, *supra*, part II-C, were succinctly summarized by the Second

machine composed of public employees; (4) to prevent coercion of public employees, although "it may be . . . that prohibitions against coercion are sufficient protection." *Id.*, at 565-566.

Circuit drawing on and synthesizing this Court's decisions:

"The congressional purpose in authorizing mandatory union dues is surely a permissible one, for Congress was understandably concerned with minimizing industrial strife and thereby insuring the unimpeded flow of commerce. It was the legislative judgment that these goals are most easily realized if a suitable collective bargaining apparatus exists, see, e. g., *International Association of Machinists v Street*, 367 US 740, 760 (1961), and so the national labor laws provide for an exclusive bargaining agent to represent each discrete employee bargaining unit. See, e. g., § 9(a) of the NLRA, 29 U.S.C. § 159(a). To enable these agents to fulfill their statutory responsibility to represent all the employees while collectively bargaining with the employer, the statutes permit the levying of mandatory dues on all employees who will reap the benefits of the union's representation of them in the contract negotiations with the employer. A required tolerance of 'free riders,' i.e., those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden, would result not only in flagrant inequity, see, e.g., *NLRB v General Motors Corp*, 373 US 374 740-743, (1963); *Radio Officers' Union v NLRB*, 347 US 17, 41, (1954), but might also eventually seriously undermine the union's ability to perform its bargaining functions. It is thus manifest that the statutory treatment of mandatory union dues serves a 'substantial public interest.' "

Buckley v American Federation of Television & Radio Artists, 496 F2d 305, 311 (CA 2, 1974), cert den 419 US 1093 (1974), reh den 420 US 956 (1975).³⁵

³⁵ A series of cases has consistently rejected First Amendment religious claims against enforcement of union security clauses.

The concept that a citizen of a polity may be required to share the costs of its government is rooted in historical antiquity and represents an obvious plan of equality and equity. The individual citizen need not be in agreement with or even be a beneficiary in any direct sense of the expenditures for which he is taxed. For example, residents without any children, or with children in private or religious schools, must still pay the taxes for the support of the public schools. The benefit to the dues payer in the present situation is, by contrast, concrete and tangible (see pp. 27-31, *supra*).

Finally, since in this case the enactment challenged is that of a state regulating labor relations with government employees of the state subdivisions, the principle of reasonable deference to the legislature is at least as appropriate as it was in *Letter Carriers*. See *supra*, part II-A.³⁶

Linscott v Millers Falls Co, 440 F2d 14 (CA 1, 1971), *cert den* 404 US 872 (1971); *Gray v Gulf, Mobile & Ohio Railroad Co*, 429 F2d 1964 (CA 5, 1970), *cert den* 400 US 1001 (1971); *Yott v North American Rockwell Corp*, 501 F2d 398 (CA 9, 1974); *Hammond v United Papermakers and Paperworkers Union, AFL-CIO*, 462 F2d 174 (CA 6, 1972), *cert den* 409 US 1028 (1972); *Ciba-Geigy Corp v United Textile Workers*, — F Supp —, 88 LRRM 3187 (D RI, 1975); *Wondzell v Alaska Wood Products, Inc*, 91 LRRM 2902 (Alas Super Ct, 1975). These cases have found a "compelling governmental interest" in collective bargaining and industrial peace as embodied in the federal labor laws, justifying the asserted burdens on the complaining plaintiffs' religious practices. The courts have found an appropriate accommodation of interests in the complainants being excused from the obligation of union membership, while remaining required to pay fees equivalent to union dues—considered a relatively insignificant intrusion, if any, on the objectors' rights.

³⁶ If state sovereignty precludes the Congress from regulating conditions of state employment, *National League of Cities v Usery*, then surely the states are free to regulate those conditions themselves as an aspect of their own sovereignty. If Michigan under PERA can permit a school board summarily to fire virtually all of a school district's employees for striking, *Crestwood Education Association v Board of Education of School District of Crestwood*, then surely it can authorize a school board under the same Act

Thus, a state statute providing for agency shop clauses when negotiated between parties to a collective bargaining agreement covering public employees reflects substantial public interests. Even if, contrary to *Hanson* and *Lathrop*, it is considered that such clauses "abridge protected rights of association" (*Lathrop, supra*, 367 US at 842), the interests served by any such abridgement are "important," the degree of infringement of any associational interests is minor, and the state's broad authority to order the labor relations of its subdivisions is at least equivalent to the authority of Congress to determine the conditions of employment of federal employees.

to agree to positive mechanisms designed to head off labor disputes in the first place, by making the collective bargaining process work. If there is no fundamental right of government employment, *Massachusetts Board of Retirement v Murgia*, and the power of discharge which belongs to every employer is "unremarkable," *Hortonville School District v Hortonville Education Ass'n*, then surely it is no more remarkable when authorized in union security mechanisms intended to assure constructive labor relations in the public sector. And if a governmental employer owes lesser constitutional responsibilities to its own employees than to the public at large, *Pickering v Board of Education* and last term's cases, and if a state can impinge directly upon the political activities and expression of its employees for "valid and important state interests," *Broadrick v Oklahoma*, 413 US 601, 606, then surely it may achieve like goals through union security provisions which impinge on no freedom of expression or political activities whatever or which, *arguendo*, if they do, are justified under the most demanding of standards on a balancing basis.

CONCLUSION

As we have shown, under the governing Michigan law as construed and limited by the ruling below, there is no genuine issue of compulsory political expenditures support in this case. And as concerns the validity of the agency shop in public employment, this Court's *Hanson* ruling leaves no serious doubt. Since under the federal laws employees in the private sector may constitutionally be required to provide pro-rata financial support to the collective bargaining representative, there is no valid reason for a different result in the case of employees who are represented in and beneficiaries of public sector collective bargaining. Indeed, this Court's several decisions at the last term underscore that states have even more regulatory discretion and latitude to set the terms and conditions of their own public employment than does the Congress.

Pro-rata financial support by public employees, under the agency shop compromise, is eminently with the state's authority and well within constitutional bounds.

It is submitted that the appeal should be dismissed for want of a substantial federal question, or the ruling below should be affirmed.

Respectfully submitted,
THEODORE SACHS
Attorney for Appellees
1000 Farmer
Detroit, Michigan 48226

APPENDIX

September, 1976.

APPENDIX A-1

States — including the District of Columbia — where public employee collective bargaining is expressly permitted by statute, executive order, or regulation.

ALASKA

Alas. Stat. §23.40.070 *et seq.* (1972) (public employees generally, except teachers and non-certified employees of school districts); *Id.* §23.40.110(a)(5), (c)(2)(1972) (mutual duty to bargain); *Id.* §23.40.100(b) (exclusive representation); Alas. Stat. Ann. §14.20.550 *et seq.* (1975); *Id.* (mutual duty to negotiate); *Id.* §14.20.560(b) (exclusive representation);

CALIFORNIA

Cal. Gov't Code §3500 *et seq.* (Supp. 1976); *Id.* §3501 (local public employees except teachers); *Id.* §3505 (duty to meet and confer); *Id.* §3502 (employees can represent themselves individually); Cal. Gov't Code §3525 *et seq.* (Supp. 1976) (state employees); *Id.* §3530 (teachers) (duty to meet, confer and negotiate); *Id.* §3527 (employees can represent themselves individually); Cal. Gov't Code §3540 *et seq.* (Supp. 1976); *Id.* §3543.5(c) (duty to meet and confer); *Id.* §3543.1 (exclusive representation); Cal. Pub. Util. Code §70120 (1973) (transit workers); *Id.* (duty to negotiate in good faith); *Id.* (exclusive representation);

CONNECTICUT

Conn. Pub. Act No. 75-566 §1 *et seq.* (1975) (state employees); *Id.* §3(a)(4), (b)(3) (mutual duty to bargain); *Id.* §5 (exclusive representation); Conn. Gen. Stat. Ann. §7-467 *et seq.*, as amended, (1972) (municipal employees); *Id.* §7-469 (mutual duty to bargain); *Id.* §7-468 (exclusive representation); Conn. Gen. Stat. Ann. §10-153 (a) *et seq.*

(Supp. 1976) (teachers); *Id.* §10-153(d); (mutual duty to bargain); *Id.* §1536(c) (exclusive representation);

DELAWARE

Del. Code Ann. tit. 19, §1301 *et seq.* (1974) (state and local public employees); *Id.* §1301(e) (mutual duty to bargain); *Id.* §1306 (exclusive representation); Del. Code Ann. tit. 14, §4001 *et seq.* (1974) (public school employees); *Id.* §4008(a) (mutual duty to bargain); *Id.* §4004 (exclusive representation); *Id.* §4007 (employees may appear on their own behalf on matters concerning their employment relations); Del. Code Ann. tit 19, §802 (protects collective bargaining rights of transit workers);

FLORIDA

Fla. Stat. Ann. §447.001 *et seq.* (Supp. 1976-77) (public employees generally); *Id.* §§447.010(1), 447.002(14) (mutual duty to bargain); *Id.* §447.009 (exclusive representation);

GEORGIA

Ga. Code Ann. §54-1301 *et seq.* (1974) (fire fighters); *Id.* §54.1314 (applies to cities of 20,000 or more which choose to be covered); *Id.* §§54-1304, 54-1306 (mutual duty to bargain); *Id.* §54-1305 (exclusive representation);

HAWAII

Hawaii Rev. Stat. §89-1 *et seq.* (Supp. 1975) (public employees generally); *Id.* §89-9 (mutual duty to bargain); *Id.* §89-8(a) (exclusive representation);

IDAHO

Idaho Code §44-1801 *et seq.* (Supp. 1975) (fire fighters); *Id.* §§44-1802, 44-1804 (meet and confer); *Id.* §44-1803 (exclusive representation); Idaho Code §33-1271 *et seq.* (Supp.

1975) (teachers); *Id.* §33-1272(3) (mutual duty to meet and confer); *Id.* §33-1273 (exclusive representation);

ILLINOIS

Ill. Exec. Order No. 6 (Sept. 1973) (state employees); *Id.* §6 (mutual duty to bargain); *Id.* §5 (exclusive representation); Ill. Ann. Stat. §328(a) (1966) (permits collective bargaining for municipal transit workers);

INDIANA

Ind. Ann. Stat. Code §20-7.5-1-1 *et seq.* (1975) (teachers); *Id.* §20-7.5-1-3 (mutual duty to bargain); *Id.* §20-7.5-1-10 (exclusive representation); Ind. Ann. Stat. Code §22-6-4-1 *et seq.* (Supp. 1976) (public employees excluding police, fire fighters, and teachers); *Id.* §22-6-4-13 (mutual duty to bargain); *Id.* 22-6-4-7(b) (exclusive representation). *But see Benton Community School Corp. v Ind. Educ. Employment Labor Rel. Bd.*, Case No. C 75-141, 91 LRRM 2521 (Ind. Cir. Ct. 1976) (holding Ind. Ann. Stat. Code §20-7.5-1-1 *et seq.* unconstitutional), appeal filed (1976). *See Appendix A-2, infra.*

IOWA

Iowa Code Ann. §20.1 *et seq.*, *as amended*, (Supp. 1976) (public employees generally); *Id.* §§9, 16 (mutual duty to bargain); *Id.* §14.1 (exclusive representation);

KANSAS

Kan. Stat. Ann. §75-4321 *et seq.* (Supp. 1975) (public employees generally, excluding teachers); *Id.* §75-4322(m) (mutual duty to meet and confer); *Id.* §4327(d) (exclusive representation);

KENTUCKY

Ky. Rev. Stat. Ann. §345.010 *et seq.*, *as amended*, (1973) (fire fighters); *Id.* §345.010(1) (applies to cities of 300,000

or more and to cities that petition for coverage); *Id.* §345.040 (mutual duty to bargain); *Id.* §345.030(3) (exclusive representation); Ky. Rev. Stat. Ann. §78.470 *et seq.* (1972) (permits collective bargaining for county police in counties of 300,000 or more);

LOUISIANA

La. Stat. Ann. §23.890 (Supp. 1976) (transit workers); *Id.* (requires employer to bargain collectively with union selected by majority). See Appendix A-2, *infra*;

MAINE

Me. Rev. Stat. Ann., tit. 26, §1021 *et seq.* (Supp. 1975-76) (university employees); *Id.* §1026 (mutual duty to bargain); *Id.* §1025-B (exclusive representation); Me. Rev. Stat. Ann., tit. 26, §961 *et seq.* (1974) (municipal employees); *Id.* §965 (mutual duty to bargain); *Id.* §967 (exclusive representation); Me. Rev. Stat. Ann., tit. 26, §979 *et seq.*, as amended, (Supp. 1975-76) (state employees); *Id.* §979-D (mutual duty to bargain); *Id.* §979-E (exclusive representation);

MARYLAND

Ann. Code of Md., art. 77, §160 *et seq.*, §160 A *et seq.*, as amended (1975) (certified and non-certified public school employees in certain counties); *Id.* §§160(b), 160 A(h) (mutual duty to meet and confer); *Id.* §§160(f), 160 A(f) (exclusive representation); Ann. Code of Md., art. 64B, §37(b) (1972) (transit workers);

MASSACHUSETTS

Mass. Gen. Laws Ann., ch. 150 E, §1 *et seq.* (1976) (public employees generally); *Id.* §6 (mutual duty to bargain); *Id.* §4 (exclusive representation);

MICHIGAN

Mich. Comp. Laws Ann. §423.201 *et seq.*, as amended, (Supp. 1976-77) (public employees except state civil service); *Id.* §423.215 (mutual duty to bargain); *Id.* §423.211 (exclusive representation);

MINNESOTA

Minn. Stat. Ann. §179.61 *et seq.*, as amended, (Supp. 1976) (public employees generally); *Id.* §179.65(4) (mutual duty to bargain); *Id.* §179.65(2) (exclusive representation);

MISSOURI

Ann. Mo. Stat. §105.500 *et seq.* (Supp. 1976) (public employees excluding police, sheriffs, highway patrol and national guard); *Id.* §105.520 (meet and confer); *Id.* §105.500 (exclusive representation);

MONTANA

Rev. Code of Mont. §59-1601 *et seq.* (Supp. 1975) (public employees generally, excluding nurses); *Id.* §§59-1604, 59-1605 (mutual duty to bargain); *Id.* §59-1609 (exclusive representation); Rev. Code of Mont. §41-2201 *et seq.* (Supp. 1975) (nurses); *Id.* §41-2203(4) (mutual duty to bargain); *Id.* §41-2205 (exclusive representation);

NEBRASKA

Neb. Rev. Stat. Code Ann. §48-801 *et seq.* (1974) (public employees and public utility employees); *Id.* §48-816 (mutual duty to bargain and exclusive representation); Neb. Rev. Stat. Ann. §79-1287 (1971) (teachers of certain school districts); *Id.* §§79-1290, 79-1292 (meet and confer upon board of education approval); *Id.* §79-1289 (representation of members only);

NEVADA

Nev. Rev. Stat. §288.010 *et seq.*, as amended, (1973) (lo-

cal public employees); *Id.* §288.150 (mutual duty to bargain); *Id.* §288.160(2) (exclusive representation);

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. §273-A:1 *et seq.* (Supp. 1975) (public employees generally); *Id.* §273-A:3 (mutual duty to bargain); *Id.* §273-A:11 (exclusive representation);

NEW JERSEY

N.J. Stat. Ann. §34:13 A-1 *et seq.* (Supp. 1976) (public employees generally); *Id.* §34:13 A-5:3 (Supp. 1976) (mutual duty to bargain, exclusive representation);

NEW MEXICO

Regs. for Labor Management Rel. §1 *et seq.*, N.M. State Personnel Bd., (effective June 1, 1976) reported in 51 BNA/Gov't Employee Rel. Rep. Ref. File 4011 (1976); *Id.* (state classified employees); *Id.* §1 (permits but does not require collective bargaining); *Id.* §§22(i), 7 (permits exclusive representation);

NEW YORK

NY Civil Service Law §200 *et seq.* (McKinney, 1973); *Id.* §§204(2), 209a(1)(d) (mutual duty to bargain);

NORTH DAKOTA

N.D. Cent. Code §15-38.01 *et seq.* (1971) (teachers); *Id.* §15-38.12 (mutual duty to bargain); *Id.* §15-38.11 (exclusive representation);

OKLAHOMA

Okla. Stat. Ann., tit. 11, §548.1 *et seq.* (Supp. 1975-76) (fire fighters); *Id.* §§548.3(7), 548.3(8)(a)(5), 548.3(8)(b)(3) (mutual duty to bargain); *Id.* §548.4c(1) (exclusive representation); Okla. Stat. Ann., tit. 70, §509.1 *et seq.* (1972) (teachers); *Id.* §509.6 (duty to bargain in good

faith); *Id.* §509.2 (exclusive representation but individual may choose to opt out);

OREGON

Ore. Rev. Stat. §243.650 *et seq.*, as amended, (1975) (public employees generally); *Id.* §§243.656, 243.650(4) (mutual duty to bargain); *Id.* §243.466 (exclusive representation);

PENNSYLVANIA

Pa. Stat. Ann., tit. 43, §1101.101 *et seq.* (Supp. 1976-77) (public employees except policemen and fire fighters); *Id.* §§1101.701, 1101.120(a)(5) and (b)(5) (mutual duty to bargain); *Id.* §1101.606 (exclusive representation); Pa. Stat. Ann., tit. 43, §217.1 *et seq.* (Supp. 1976-77) (policemen and fire fighters); *Id.* §217.2 (mutual duty to bargain); *Id.* §217.1 (exclusive representation); Pa. Stat. Ann., tit. 53, §399.51 (Supp. 1976-77) (transit workers); *Id.* §399.51(d) (duty to bargain collectively and enter into written agreement);

RHODE ISLAND

Gen. Laws of R.I. Ann. §36-11-1 *et seq.*, as amended, (Supp. 1975) (state employees); *Id.* §36-11-7 (mutual duty to bargain); *Id.* §36-11-2 (exclusive representation); Gen. Laws of R.I. Ann. §28-9.4-1 *et seq.* (Supp. 1975) (municipal employees); *Id.* §28-9.4-5 (mutual duty to bargain); *Id.* §28-9.4-4 (exclusive representation); Gen. Laws of R.I. Ann. §28-9.3-1 *et seq.*, as amended, (Supp. 1975) (teachers); *Id.* §28-9.3-4 (mutual duty to bargain); *Id.* §29-9.3-3 (exclusive representation);

SOUTH DAKOTA

S.D. Comp. Laws Ann. §3-18-1 *et seq.* (1974) (public employees generally); *Id.* §§3-18-2, 3-18-3.1(5), 3-18-3.2(4)

(mutual duty to bargain); *Id.* §3-18-3 (exclusive representation);

TENNESSEE

Tenn. Code Ann. §6-3802 (1975) (collective bargaining for transit workers);

TEXAS

Civ. Stat. of Tex. Ann., art. 5154c-1, §1 *et seq.* (Supp. 1975-76) (policemen and fire fighters); *Id.* §6 (mutual duty to bargain); *Id.* §6 (exclusive representation);

UTAH

Utah Code Ann. §34-20a-1 *et seq.* (Supp. 1975) (fire fighters); *Id.* §34-20a-5 (mutual duty to bargain); *Id.* §34-20a-3 (exclusive representation);

VERMONT

Vt. Stat. Ann., tit. 27, §901 *et seq.*, *as amended*, (Supp. 1975) (state employees and employees of state colleges); *Id.* §§902(2), 961(4), 962(4) (mutual duty to bargain); *Id.* §941(h) (exclusive representation); Vt. Stat. Ann., tit. 21, §1721 *et seq.* (Supp. 1975) (municipal employees); *Id.* §1725 (mutual duty to bargain); *Id.* §1723 (exclusive representation); Vt. Stat. Ann., tit. 16, §1981 *et seq.* (Supp. 1975) (teachers); *Id.* §2001 (mutual duty to bargain); *Id.* §1991(a) (exclusive representation);

WASHINGTON

Wash. Rev. Code Ann. §41.56.010 *et seq.* (1974) (local public employees); *Id.* §41.56.030(4) (mutual duty to bargain); *Id.* §41.56.080 (exclusive representation); Wash. Rev. Code Ann. §28B.52.010 *et seq.* (1974) (academic community college employees); *Id.* §28B.52.030 (mutual duty to negotiate); *Id.* §28B.52.050 (individual may represent

himself); Wash. Rev. Code Ann. §28B.16.100 (1975) (teachers in higher education, permits collective negotiation and provides for exclusive representation); Wash. Rev. Code Ann. §41.59.010 *et seq.* (1975) (teachers); *Id.* §41.59.020(2) (mutual duty to bargain); *Id.* §41.59.090 (exclusive representation); Wash. Rev. Code Ann. §41.06.140 *et seq.* (Supp. 1975) (state civil service employees, civil service given authority to promulgate rules for collective bargaining); *Id.* §41.06.150 (exclusive representation);

WISCONSIN

Wis. Stat. Ann. §111.80 *et seq.* (1974) (state employees); *Id.* §111.84 (1)(d), (2)(c) (mutual duty to bargain); *Id.* §111.83(1) (exclusive representation); Wis. Stat. Ann. §111.70 *et seq.* (1974) (local employees); *Id.* §111.70(3)(a) (4), (b)(3) (mutual duty to bargain); *Id.* §111.70(4)(d) (1) (exclusive representation);

WYOMING

Wyo. Stat. §27-265 *et seq.* (1967) (fire fighters); *Id.* §§27-266, 27-267 (meet and confer); *Id.* §27-267 (exclusive representation);

DISTRICT OF COLUMBIA

Order No. 70-229, Comm'r of D. C., District Personnel Manual, ch. 25A (1970) (public employees generally); *Id.* §3(1) (duty to negotiate); *Id.* §3(j) (exclusive representation).

APPENDIX A-2

States permitting public employee collective bargaining by court or attorney general opinion.

ARIZONA

IBEW v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954) (public employers may, but are not required to enter into collective bargaining agreement with their employees);

ARKANSAS

Fort Smith v. Ark State Council, No. 48, 245 Ark. 409, 433 S.W. 2d 153 (1968) (public employers may, but are not required to bargain collectively with union);

COLORADO

Littleton Educ Assn v. Arapahoe School Dist. No. 6, Civ. No. 26963 (Colo. Sup. Ct. 1976) (permits collective bargaining without statutory authorization);

INDIANA

East Chicago Teachers Union, Local 511 v. Bd. of Trustees of East Chicago, 287 N.E. 2d (Ind. Ct. Appeals, 1972) (school board has authority to enter collective bargaining agreements); see citations in Appendix A-1 *Supra*;

LOUISIANA

Louisiana Teachers Assn v Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. Appeals, 1974), writ of review denied, 305 So. 2d 541 (La. Sup. Ct. 1975) (school board has the authority to bargain collectively with teachers' union and to recognize it as exclusive bargaining agent); *New Orleans Fire Fighters Assn, Local 632 v. New Orleans*, 204 So. 2d 690 (La. Ct. App. 1967) (oral collective bargaining agreement between city and union enforced);

OHIO

Foltz v. Dayton, 50 Ohio Op. 384, 272 N.E. 2d 169 (Ohio

Ct. of Appeals, 1970) (municipal employees have collective bargaining rights); *Ohio Civil Service Employees Assn. v. Div. II, Ohio Dept. of Highways*, 272 N.E. 2d 919 (Ct. Common Pleas, Tuscarawas City, 1970) (employer may discuss working conditions with union, but cannot enter collective bargaining agreement);

WEST VIRGINIA

Op. Att'y. Gen. (June 26, 1974) (county school board may recognize teacher unions and bargain collectively with them); Op. Att'y. Gen. (July, 1962) (public employee may join unions and discuss wages, hours, and working conditions, but final determination rests with the public employer);

APPENDIX A-3

States—including the District of Columbia—permitting union security for some or all public employees.

ALASKA

Alas. Stat. §23.40.110 (b)(i) & (2) (1972) (public employees except teachers and non-certified employees of school districts may enter into union or agency shop provisions); *Id.* §23.40.255, as amended, reported BNA 11 SLL 215 (Aug. 9, 1976) (union security provisions must protect "right of nonassociation" of employees having bona fide religious convictions against joining or participating in the union; such employees shall pay the equivalent of fees, dues, and assessments which the union shall contribute to the charity of its choice); *Id.* §14.20.550(b)(1) (2)(1972) (authorizes collective bargaining for teachers but is silent with respect to union security);

CALIFORNIA

Cal. Gov't Code §3546 (Supp. 1976) (public education employees may negotiate "organizational security provision," but the employer may request that such issue be severed and ratified separately by the employees); *Id.* §3540.1 (i)(1), (2) (organization security means either agency shop or union shop). *But see*, Cal. Gov't Code §3502 (1966) (local public employees have right to refuse to join union or to participate in union activities); *Hayward v. United Public Service Employees, Local 390*, 54 Cal. App. 3d 761, 126 Cal. Rptr. 710 (1976) (the above statutory provision also prohibits agency shop; Cal. Gov't Code §3527 (Supp. 1975) (state employees have right to refuse to join union and to participate in union and union activities); Cal. Pub. Util. Code §70120 (1973) (silent on union security);

CONNECTICUT

Conn. Pub. Act No. 750566, §11 (a)-(b) (Jan., 1975) (bargaining unit employees who are not members of exclusive representative are required to pay an agency shop service fee. Dues and service fee check-off is negotiable); Conn. Gen. Stat. Ann. §7-477 (1972) (payroll deduction of union dues and fees for municipal employees is negotiable). This latter provision when read together with the other provisions of the act (Conn. Gen. Stat. Ann. §7-467 *et seq.*) seems to allow union security for municipal employees. *See*, Conn. Gen. Stat. Ann. §7-468 (1972) (employees have the right to form, join, or assist union, free from actual coercion or restraint, but no right to refrain from joining, forming or assisting unions is expressed); Conn. Gen. Stat. Ann. §7-470, *as amended*, (Supp. 1976) (these unfair practice provisions do not include as an unfair practice

discrimination for the purpose of encouraging or discouraging union membership); *Local 1390, AFSMCE*, Consolidated Case Nos. MVPP 2836-39, reported in 653 BNA Gov't Employee Rel. Rep. at B-1 (Conn. St. Bd. of Labor Relations, 1976) (Conn. Gen. Stat. §7-467 *et seq.* implicitly authorizes union shop). *But see*, Conn. Gen. Stat. Ann. §10-153 (a) (Supp. 1976) (expressly prohibits union shop for teachers);

HAWAII

Hawaii Rev. Stat. Ann. §89-3, 4(a) (Supp. 1975) (state and local employers are required upon the exclusive representative's request to deduct from every bargaining unit member's check a reasonable service fee to defray the union's costs in negotiating and administering the contract); *Id.* §89-4(b) (checkoff of regular union dues, initiation fees, insurance premiums upon employees written authorization);

KENTUCKY

Ky. Rev. Stat. Ann. §345.050(1)(c) (1973) (municipal employers are authorized to enter union shop agreements with fire fighter unions). *But see*, Ky. Rev. Stat. Ann. §78.470 (1972) (prohibits union and agency shop for county employees);

MAINE

Me. Rev. Stat. Ann., tit. 26, §10. 3) (Supp. 1975-76) (union shop and agency shop negotiable for university employees). *But see*, Me. Rev. Stat. Ann., tit. 26, §§963, 964 (1)B, 964(2) (1974) (may be construed to prohibit union and agency shop for municipal employees); Me. Rev. Stat. Ann., tit. 26, §§979-B, 979-C(1)B, (2)A (Supp. 1975-76) (may be construed to prohibit union and agency shop for state employees);

MASSACHUSETTS

Mass. Gen. Laws Ann., ch. 150E, §12 (Supp. 1976) (if the collective bargaining agreement so provides, the public employer shall require as a condition of employment the payment of a service fee proportionately commensurate with the cost of collective bargaining and contract administration; such a provision must be ratified by a majority of the employees voting); Mass. Gen. Laws Ann., ch. 180, §17G (Supp. 1976) (need written employee authorization for check-off of the above-mentioned service fee). *See, Karchman v. Worcester*, Mass., 301 N.E. 2d 570 (1973) (nonunion members have the option as to whether the service fee will be deducted from their payroll check, but they are still obligated to pay the service fee);

MICHIGAN

Mich. Comp. Laws Ann. §423.210(1) (Supp. 1976-77) (agency shop negotiable for public employees);

MINNESOTA

Minn. Stat. Ann. §179.65(2), as amended, Pub. L. 1976, ch. 102 (effective March 17, 1976) (all public employees who are not members of the union may be required to contribute a fair share service fee equal to regular membership dues less the costs of benefits financed through membership dues; the fair share service fee shall not exceed 85% of the regular membership dues); *Robbinsdale Educ. Assn. v. Robbinsdale Federation of Teachers*, Minn., 239 N.W. 2d 437 (Minn. Sup. Ct. 1976) appeal filed, No. 75-1628 (U.S. Sup. Ct., May 7, 1976) (fair share provision upheld as not violating due process); *Knight v. Alsop*, F. 2d, 92 LRRM 2627 (C.A. 8, 1976) (three judge panel convened to hear constitutional challenges to

the fair share provision); *Beckman v. St. Louis County Bd. of Commissioners*, Minn., 241 N.W. 2d 302 (1976) (prior to enactment of the 1973 amendment providing for fair share, checkoff of service fee under agency shop agreement held unlawful because the earlier statute provided that employees must consent to checkoff);

MONTANA

Rev. Code of Mont. §59-1605(1)(c) (Supp. 1975) (agency shop is negotiable for all public employees except nurses; service fee is the equivalent of union dues and initiation fees). *But see*, Rev. Code of Mont. §41-2201 *et seq.* (Supp. 1975) (silent with respect to union security for nurses); *Id.* §41-2203(3) (it's an unfair practice for an employer to discriminate with respect to hiring and conditions of employment to encourage or discourage union membership);

OREGON

Ore. Rev. Stat. §§243.650(10), 243.672(1)(c) (1975) (public employer and union can negotiate a fair share agreement whereby employees who are not members of the union are required to make "an in-lieu-of-dues payment" to the union; such an agreement must reflect majority opinion); *Id.* §243.666(1) (1975) (union security — including union or agency shop agreement—must safeguard "the rights of non-association" by allowing those who cannot join the union because of religious beliefs to pay the equivalent of union dues, fees, and assessments to a charity);

PENNSYLVANIA

Pa. Stat. Ann., tit. 43, §1101.705 (maintenance of membership and dues checkoff provisions are negotiable); *Pa. Labor Relations Board v. Zelem*, 459 Pa. 399, 329 A. 2d 474 (1974) (agency shop provisions are implicitly prohibited under the above statute); Pa. Stat. Ann., tit. 43, §217.1

et seq. (Supp. 1976-77) (for policemen and fire fighters) (silent with respect to union security); Pa. Stat. Ann., tit. 53, §39951 (Supp. 1976-77) (silent with respect to union security for transit workers);

RHODE ISLAND

Gen Laws. R.I. §36-11-2, *as amended*, (Supp. 1975) (once an exclusive bargaining representative is selected, all non-members are required to pay the union a service fee equal to the membership dues); Gen. Laws. R.I. §28-9.3-7, *as amended*, (Supp. 1975) (where teachers have selected an exclusive bargaining representative, all non-members shall pay to the union a service charge equal to the regular dues); *North Kingston v. North Kingston Teachers Assn., Local 1704*, 110 R.I. 698, 297 A. 2d 342 (1972) (prior to the enactment of the above statutory provision, the court upheld fair share agency shop even though the teachers had the right to refrain from joining the union); Gen. Laws R.I. §28-9.4-1 *et seq.* (1969) (there is no express authorization for union security for municipal employees, and such employees have the right to refrain from joining a union. However, according to *North Kingston, supra*, municipal employers and unions could still negotiate fair share agreements);

VERMONT

Vt. Stat. Ann., tit. 21, §§1722(a)(1), 1726(a)(8) (Supp. 1975) (union shop and agency shop negotiable for municipal employees); Vt. Stat. Ann., tit. 16, §1982(a) (Supp. 1975) (teachers have the right to refrain from joining or participating in a union); Vt. Stat. Ann., tit. 21, §1735 (Supp. 1975) (teachers are deemed municipal employees within the meaning of the unfair practice sections, such as §1726(a)(8), and, by implication, therefore, agency and

union shop provisions for teachers should be permissible); *but see*, Vt. Stat. Ann., tit. 27, §903, *as amended*, (Supp. 1975) (state employees are expressly prohibited from entering into agency shop and union shop agreements);

WASHINGTON

Wash. Rev. Code §41.56.122(1) (1975) (union security provisions other than closed shop are negotiable for public employees so long as the "right of non-association" for employees with religious beliefs against union activity is protected by allowing such employees to pay the equivalent of union dues to a charity); Wash. Rev. Code §41.59.100 (1975) (union security other than closed and union shop is negotiable for certified school employees but "right of non-association" of employees with religious beliefs against participating in a union must be protected by allowing such employees to pay the equivalent of such dues to a charity); Wash. Rev. Code §28B.16.100 (1975) (requires agency shop for higher education teachers upon the union's request and after a majority of the bargaining unit members vote to require it as a condition of employment, but "the right of non-association" must be protected as stated in the above statutes); Wash. Rev. Code §41.06.150 (Supp. 1975) (requires agency shop for state civil service employees upon the union's request and after a majority of the bargaining unit members vote to require it as a condition of employment but "right of non-association" must be protected as in the above statutes); *See, Assn. of Capitol Powerhouse Engineers v. Division of Bldg. and Grounds, State of Washington*, Case No. 50436 (Thurston Cty. Super. Ct., March 26, 1976), appeal filed (1976), reported in 641 BNA Gov't Employee Rel. Rep. at B-4 (June 14, 1976) (agency shop provision upheld as not violating

freedom of speech, assembly, religion, due process, and equal protection under state and U.S. Constitution). *But see*, Wash. Rev. Code. §28B.52.070 (1974) (boards of trustees of community colleges cannot discriminate against academic employees because of membership or nonmembership in a union); Op. Att'y Gen., 1975 No. 7 (April 22, 1975), reported in 620 BNA Gov't Employee Rel. Rep. at B-9 (August 25, 1975) (the above provision prohibits agency shop agreements for such academic employees);

WISCONSIN

Wis. Stat. Ann. §§111.84(1)(f), 111.81(6) (1974) (agency shop for state employees is negotiable, "fair share" service fee is the equivalent of union dues); Wis. Stat. Ann. §§111.70(2), 111.70(1)(h) (1974) (agency shop for municipal employees is negotiable, "fair share" service fee is the equivalent of union dues); *See Flood v. Bd. of Educ., Jt. School District No. 1*, 69 Wis. 2d 184, 230 N.W. 2d 711 (1974) (constitutionality of fair share provisions is a proper subject for judicial review);

DISTRICT OF COLUMBIA

Exec. Order No. 70-22⁹, Comm'r of D.C., District Personnel Manual, ch. 25A §13 (1970) (agency shop for public employees is negotiable).

APPENDIX B

DFT BYLAWS, ARTICLE II

Section 1. Political Objections by Dissenters

Any person making dues payments, or service fee payments to the Union in lieu of dues under agency shop provisions in the Union's Collective Bargaining Agreement, shall have the right to object to the expenditure of his/her portion of such payments for activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment. Such objections shall be made, if at all, by the objector individually notifying the Union President and Treasurer of his/her objection by registered or certified mail, during the period between September 1-15 of each year. Such objection, if any, shall be renewed each year in the same period in the same manner.

The approximate proportion of dues and service fees spent by the Union for such purposes shall be determined annually, after each fiscal year of the Union, by the Union's officers. Rebate of a pro-rated portion of his/her dues or service fees corresponding to such proportion shall thereafter be made to each individual who has timely filed a notice of objection, as provided above.

Section 2. Appeals

If an objector is dissatisfied with the proportional allocation that has been determined on the ground that it assertedly does not accurately reflect the expenditures of the Union in the defined area, an appeal may be taken by such person to the Union Executive Board within thirty (30) days following receipt of such rebate or receipt of notice of such allocation. The Executive Board shall render a decision on such appeal within thirty (30) days following its receipt. If the objector remains dissatisfied, he/she may

file an appeal therefrom to the membership by lodging the appeal with the President of the Union within thirty (30) days following receipt of the Executive Board decision, which appeal shall be heard at the next regular membership meeting of the Union or at a regular membership meeting which occurs within ninety (90) days thereafter.

If he/she is dissatisfied with the membership action, he/she may further appeal, within thirty (30) days following the decision of the membership, to the Review Panel as provided in Section 3.

Section 3. Review Panel

(a) In order to assure objective disposition of complaints about rebates of sums paid to the Union under dues or agency shop contract provisions, there shall be established a Review Panel composed of prominent disinterested citizens who are not a part of or employed by the American Federation of Teachers or its affiliates.

(b) The Review Panel shall consist of not more than five (5) members including the chairman. The Union President shall, with the approval of the Union Executive Board, designate the members including the chairman of the initial Review Panel. Thereafter, whenever a vacancy shall occur on the Review Panel, the vacancy shall be filled by the Union President from a list of names submitted by the remaining members of the Review Panel.

(c) The Review Panel shall have the authority and power to make final and binding decisions in rebate cases appealed to it under this Article.

(d) The Review Panel shall formulate such rules of procedure and establish such practices as it finds necessary to its proper functioning.

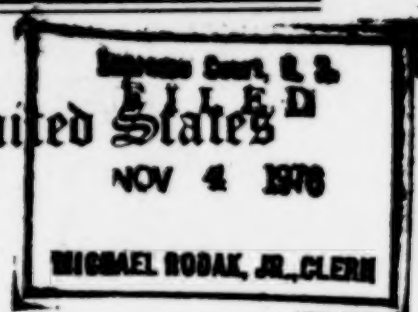
(e) The Review Panel shall submit to the Union Executive Board an annual report of its activities, which report shall contain a summary of all cases brought before the Review Panel during that year. Copies of the annual report shall be available upon request to all members and to all non-members subject to agency shop contract provisions.

(f) The reasonable and necessary expenses of the Review Panel shall be paid by the Union.

FOR ARGUMENT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975



No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

REPLY BRIEF FOR THE APPELLANTS

SYLVESTER PETRO
2841 Fairmont Road
Winston-Salem, North Carolina 27106
Attorney for Appellants

November 4, 1976

(continued)

Of Counsel:

JOHN L. KILCULLEN

Kilcullen, Smith & Heenan
1800 M Street, N.W., Suite 600
Washington, D.C. 20036

DENNIS B. DUBAY

Keller, Thoma, Toppin
& Schwarze, P.C.
1600 City National Bank Building
Detroit, Michigan 48226

RAYMOND J. LaJEUNESSE, JR.

National Right To Work Legal
Defense Foundation
8316 Arlington Boulevard, Suite 600
Fairfax, Virginia 22038

EDWIN VIEIRA, JR.

12408 Greenhill Drive
Silver Spring, Maryland 20904

TABLE OF CONTENTS

| | <i>Page</i> |
|---|-------------|
| TABLE OF AUTHORITIES CITED | iii |
| TABLE OF ABBREVIATIONS | vi |
| SUMMARY | 2 |
| ARGUMENT | 5 |
| I. Despite the agreement of all concerned that the PERA agency-shop provision is unconstitutionally overbroad, and despite Appellees' failure to meet the Teachers' contention that public-sector collective bargaining is inherently political, the Union and the Board seek to induce this Court to endorse a procedure designed to vitiate, rather than to vindicate, the Teachers' First- and Fourteenth-Amendment rights | 5 |
| A. The Union, the Board, the Teachers, the Amici, and the Michigan Court of Appeals all agree that the PERA agency-shop scheme is unconstitutionally overbroad | 6 |
| B. The inherently political character of public-sector collective bargaining, established by the Teachers and ineffectively challenged by Appellees, makes injunctive relief the uniquely appropriate remedy in this case | 10 |
| C. The "remedy" suggested by Appellees and the court below would exacerbate the existing invasion of the Teachers' First- and Fourteenth-Amendment rights | 14 |
| II. This case is factually distinct from <i>Hanson</i> and <i>Lathrop</i> and therefore may not be ruled legally or constitutionally by those decisions | 19 |
| III. Appellees' unsupported assertions to the contrary notwithstanding, the constitutional distinction between public and private employment is basic, a vital feature of our legal system, and crucial to a proper disposition of this case | 21 |

| | |
|--|----|
| A. Appellees continue to ignore the unconstitutional-conditions doctrine and to assert with no support in either reason or authority that there is no constitutional distinction between public and private employment | 23 |
| B. Appellees rely on a private-sector case — <i>Hanson</i> — as authority for the constitutionality of the agency-shop in public employment, notwithstanding that <i>Hanson</i> refused to uphold the constitutionality of the agency-shop unequivocally even in private employment | 24 |
| C. Negating the long-standing constitutional distinctions between state-action and private action and between public employment and private employment, as Appellees seem intent upon doing, would amount to a radical revision of the United States Constitution and of the premises upon which it is based | 27 |
| IV. Appellees have misunderstood <i>Letter Carriers</i> , <i>National League of Cities</i> , and certain other cases from last term that they have cited in support of their position, and have ignored the one decision late last term — <i>Elrod v. Burns</i> — which is directly in point and which constitutes overwhelming authority in favor of the Teachers | 29 |
| A. Appellees have misunderstood the relevance to this case of <i>National League of Cities</i> and the other decisions handed down late last term to which they refer | 30 |
| B. Appellees have misunderstood the <i>Letter Carriers</i> decision and its relationship to this case | 33 |
| C. In striking down patronage dismissals despite the weighty constitutional considerations favoring them, <i>Elrod v. Burns</i> is conclusive authority in favor of the Teachers, for no valid governmental interest has been advanced as justification for the abridgment of the Teachers' rights | 35 |

| | |
|--|----|
| V. While essentially conceding that the PERA agency-shop overbroadly infringes the Teachers' First- and Fourteenth-Amendment rights, Appellees fail to establish, to suggest, or even to acknowledge their ultimate burden to prove, in what way the infringement serves a compelling governmental interest; they demonstrate only that it serves a significant Union interest | 38 |
| A. Contrary to Appellees' claims, this Court has never passed on the constitutionality of exclusive representation in public-sector, or even private-sector, employment | 39 |
| B. Since exclusive-representative status is a special privilege redounding to the benefit of the Union, enhancing that status through the agency-shop at the expense of the Teachers' First- and Fourteenth-Amendment rights has no rational relationship to any compelling governmental interest | 42 |
| C. Appellees' analogy of agency-fees to "taxes" demonstrates how dangerously far Michigan has allowed the exclusive-representation device to intrude on governmental sovereignty, as well as on individual freedom | 50 |
| CONCLUSION | 53 |

TABLE OF AUTHORITIES CITED

Cases

| | |
|---|--------|
| <i>Atkins v. City of Charlotte</i> , 296 F. Supp. 1068 (W.D.N.C. 1969) | 32 |
| <i>Baggett v. Bullitt</i> , 377 U.S. 360 (1964) | 13, 15 |
| <i>Board of Pharmacy v. Snyder's Drug Stores, Inc.</i> , 414 U.S. 156 (1973) | 47 |
| <i>Board of Retirement v. Murgia</i> , 96 S. Ct. 2562 (1976) | 31 |
| <i>Buckley v. American Fed'n of Television & Radio Artists</i> , 419 U.S. 1093 (1974) | 42 |
| <i>Buckley v. Valeo</i> , 96 S. Ct. 612 (1976) | 49 |

(iv)

| | <i>Page</i> |
|--|----------------|
| Cafeteria & Restaurant Workers, Local 473 v. McElroy, 367 U.S. 886 (1961) | 28 |
| City of Charlotte v. Local 660, Firefighters, 96 S. Ct. 2036 (1976) | 31 |
| City of Hartford, Case No. MPP-3117, Dec. No. 1353 (Conn. Bd. Lab. Rel. 1975)..... | 12 |
| City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm'n, <i>prob. juris. noted</i> , 96 S. Ct. 1408 (1976) | 41 |
| City of Shelton, Case No. MPP-2946, Dec. No. 1344 (Conn. Bd. Lab. Rel. 1975) | 12 |
| City of Stamford, Case No. MPP-3381, Dec. No. 1421 (Conn. Bd. Lab. Rel. 1976)..... | 12 |
| Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) | 29-30,33-37,51 |
| Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830) | 11 |
| Crestwood Educ. Ass'n v. Board of Educ., 96 S. Ct. 3184 (1976) | 31 |
| Davis v. Wechsler, 263 U.S. 22 (1923) | 16 |
| Elrod v. Burns, 96 S. Ct. 2673 (1976) ... 3,8-9,17,23,26,28-30,32-38, | 45,49 |
| Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 96 S. Ct. 2308 (1976) | 31 |
| International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) | 6,11,16,27,37 |
| J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) | 40 |
| Kelley v. Johnson, 96 S. Ct. 1440 (1976) | 31 |
| Knight v. Alsop, 535 F.2d 466 (8th Cir. 1976) | 41 |
| Lathrop v. Donohue, 367 U.S. 820 (1961) | 19,21-22 |
| Marsh v. Alabama, 326 U.S. 501 (1946) | 45 |
| McCarthy v. Civil Serv. Comm'n, 96 S. Ct. 1154 (1976) | 31 |
| Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) | 15 |

(v)

| | <i>Page</i> |
|--|-----------------------------|
| Morehead v. New York <i>ex rel</i> Tipaldo, 298 U.S. 587 (1936) | 16 |
| Murdock v. Pennsylvania, 319 U.S. 105 (1943) | 45 |
| NAACP v. Button, 371 U.S. 415 (1963) | 11 |
| NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) | 40 |
| National League of Cities v. Usery, 96 S. Ct. 2465 (1976) .. | 11,29-32,51 |
| Nebbia v. New York, 291 U.S. 502 (1934) | 17 |
| Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791 (1976) | 20 |
| New York Times Co. v. Sullivan, 376 U.S. 254 (1964) | 11 |
| Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) | 40,46 |
| Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) .. | 19,21-22, 24-27,37,41,47-48 |
| <i>In re</i> Sawyer, 360 U.S. 622 (1959) | 20 |
| Smigel v. Southgate Community School Dist., 388 Mich. 531, 202 N.W.2d 305 (1972) | 51 |
| Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) | 7 |
| Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) | 40-41,44 |
| Theard v. United States, 354 U.S. 278 (1957) | 20 |
| United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) | 23,34,37 |
| United States v. O'Brien, 391 U.S. 367 (1968) | 49 |
| Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) | 40 |
| Vorbeck v. McNeal, 96 S. Ct. 3160 (1976) | 31 |
| Washington v. Davis, 96 S. Ct. 2040 (1976) | 33-34 |
| Wieman v. Updegraff, 344 U.S. 183 (1952) | 23 |
| <i>United States Constitution</i> | |
| Article III | 16 |
| Article VI, cl. 2 | 16,25 |
| First Amendment . . . 3-9,13-14,16-18,20,23,26,28,32,34,36-38,42,45-49,52 | |
| Fourteenth Amendment . . 4-9,13-14,16,23,26,28,32-33,38,42,45-47,49,52 | |

| <i>Statutes</i> | <i>Page</i> |
|--|---------------------|
| National Labor Relations Act §9(a), 29 U.S.C. §159(a) (1970) | 40,42 |
| Railway Labor Act §2, Eleventh, 45 U.S.C. §152, Eleventh (1970) | 6,11,19,24-25,27,48 |
| <i>Miscellaneous</i> | |
| P.D. Bradley, <i>Constitutional Limits to Union Power</i> (Council on Am. Affairs 1976) | 45 |
| Bradley, "Involuntary Participation in Unionism", in <i>Labor Unions and Public Policy</i> 47 (Am. Enterprise Inst. 1958) | 45 |
| W.W. Brown & C.C. Stone, <i>An Empirical Analysis of the Impact of Collective Bargaining on Faculty Salary, Compensation, and Promotions in Higher Education</i> (Ass'n of Cal. State Univ. Profs. 1976) | 45 |
| Comment, "The Mechanics of Collective Bargaining", 53 <i>Harv. L. Rev.</i> 754 (1940) | 40 |
| J. Dawson, <i>The Oracles of the Law</i> (1968) | 20 |
| <i>The Detroit Teacher</i> , Sept. 28, 1976 | 7 |
| 1 J.A. Gross, <i>The Making of the National Labor Relations Board</i> (1974) | 40 |
| Kornbluth, "Public Schools - Multi-Unit Common Bargaining Agents: A Next Phase in Teacher-School Board Bargaining in Michigan", 27 <i>Lab. L. J.</i> 520 (1976) | 34 |
| <i>NEA Advocate</i> , Sept. 1976 | 52 |
| Public Service Research Council, "Public-Sector Bargaining and Strikes", <i>Gov't Employee Rel. Rep.</i> No. 676 (Sept. 27, 1976) | 34 |
| Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?", 123 <i>U. Pa. L. Rev.</i> 897 (1975) | 42 |

| | <i>Page</i> |
|---|-------------|
| Shaffer, "Some Alternatives to Existing Labor Policies", 27 <i>Lab. L. J.</i> 370 (1976) | 42 |
| <i>U.S. News & World Report</i> , Apr. 5, 1976 | 43 |
| Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 <i>Wake Forest L. Rev.</i> 515 (1976) | 42 |
| L. Wittgenstein, <i>Tractatus Logico-Philosophicus</i> (1961 ed.) | 30 |

TABLE OF ABBREVIATIONS

For purposes of reference in the text, we shall designate the several briefs in this case as follows:

"T." - Appellant Teachers' Main Brief, filed July 9, 1976

"U." - Appellees' Brief, filed September 10, 1976

"N." - Brief *Amicus Curiae* of the National Education Association (NEA), filed September 14, 1976

"X." - Joint Brief *Amicus Curiae* of the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO) and the United Automobile Workers (UAW), filed October 15, 1976*

*We identify this *amicus* brief with the letter "X", traditionally used to designate "the unknown quantity", because we recognize that it was untimely filed, and therefore may not be considered at all by this Court. We have *not* opposed its filing, however, and have attempted to deal with the arguments it presents in so far as we were able in the limited time the joint Amici saw fit to give us.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE
COURT OF APPEALS OF MICHIGAN

REPLY BRIEF FOR THE APPELLANTS

SUMMARY

The Appellees and their Amici ask a great deal of this Court.

1. They urge the Court to abdicate its function as guardian of the Constitution in favor of an "administrative procedure" hastily formed by the Appellee Union to "reimburse" the dissident Teachers for the violations of their constitutional rights which, the Union admits, are bound to occur. It is indeed so. All concerned agree that the agency-shop authorized by the Michigan Public Employment Relations Act ("PERA") on its face abridges the Teachers' constitutional rights. The other side goes so far as to assert that the Michigan Court of Appeals actually gave judgment in favor of the Teachers on this point, so that the Teachers really have no ground for this appeal! Obviously our opponents are confusing dictum with judgment. It may suit their purpose to do so; but it nevertheless does not accurately describe this case. In fact, the court below affirmed the dismissal of the Teachers' constitutional claims; and when it did so, no matter how it garbled the result, the Michigan court legitimized the abridgment of the Teachers' constitutional rights. Presumably that is why this Court took jurisdiction of the case — and why it alone is competent to dispose of it. The Constitution of the United States, and the constitutional rights and claims of the Teachers, are not for the Union's "rebate procedure" to expound and defend. *See Part I.C., infra.*

2. Appellees and their Amici also ask the members of this Court to suspend the operation of their judicial and ratiocinative faculties. They attempt to induce the Court indiscriminatingly to follow a pair of decisions which are materially distinct from the present case and which were decided within a framework of legal principle inapplicable here. *See Parts II. and III.B., infra.* At the same time they ignore the powerful line of unconstitutional-conditions decisions upon which the Teachers have grounded their case

from the beginning. *See Part III.A., infra.* They go so far, indeed, as to contend that public employers are as free of constitutional restraints as private employers are — quite possibly one of the most extreme examples of throwing the baby out with the bath that ardent advocacy has presented in a long while. *See Part III.C., infra.*

3. Appellees and their Amici unions apparently underrate the Court's memory as much as they do its powers of discrimination. They refer at considerable length to a number of decisions last term which bear only tangentially on this case — and then not in the way that Appellees suggest. But at the same time they omit all reference to a decision handed down late last term that is practically on all fours both factually and analytically with this one. Needless to say, that decision, *Elrod v. Burns*, 96 S. Ct. 2673 (1976), is strong if not conclusive authority for the Teachers. *See Part IV.A.-C., infra.*

4. We have saved for last the greatest weakness in our opponents' briefs: their utter failure to establish any kind of acceptable defense for the abridgment of constitutional right which, they concede, has occurred and will continue to occur. A strong — or powerful — or overriding — or paramount — or compelling *public interest* is all that will save state-action which merely impinges upon, let alone abridges, First-Amendment rights. Scores of decisions leave no doubt on this point. And yet neither Appellees nor their Amici have made anything like a serious attempt to demonstrate a *public interest* served by the admittedly unconstitutional statute here involved. They have been so concerned to show how forcing the Teachers to finance public-sector bargaining will promote such bargaining — and compensate the Union for engaging in what it most wants to do — that they have forgotten to reveal how the public interest is served by either compulsory public-sector bargaining or abridging the Teachers' constitutional rights by forcing them financially to support the Union in such bargaining. *See Part V., infra.*

Of necessity, and as is only proper, the bulk of this reply concentrates upon the fallacies and distortions of the opposing briefs. We should ourselves be remiss, however, if in focussing attention upon those fallacies and distortions we failed to remind the Court of the simplicity and the strength of the Teachers' case, and of how far short Appellees and their Amici have fallen in their attempt to challenge it.

We contended and we believe we proved in our main brief that forcing the Teachers to provide financial support to the Union as a condition of employment abridges their rights under the First and Fourteenth Amendments. T. at 10 *et seq.* We went on to establish the existence of a consensus to the effect that public-sector collective bargaining is an inherently political activity, so that compelling the Teachers to support it becomes *a fortiori* unconstitutional. T. at 62-80. Appellees and their Amici have not only failed to rebut this contention; they have not even seriously attempted to meet it. See Part I.B., *infra*.

We did not stop there but went on to demonstrate that the compelled association here involved was in the constitutional sense absolute and indefensible. We emphasized that the invasion of the Teachers' associational, political, and speech-rights was direct and intended, not indirect and merely incidental to a valid and compelling public purpose; and that, therefore, this case presented a *per se* violation of the Teachers' civil liberties, one for which there was and could be no justification at all. T. at 81-115.

We completed the analysis by showing (a) that neither the Michigan Legislature nor the Appellees had advanced any public interest which might justify or even mitigate the abridgment of the Teachers' rights which has occurred in this case; and (b) that, on the contrary, the public interest is itself damaged in the course of the invasion of the Teachers' rights authorized by the Michigan Legislature and worked by agreement of the Detroit Board of Education and the Union. T. at 115-47, 147-86.

Our main brief concluded with a demonstration that the Teachers had standing to sue, that injunctive relief was the only proper relief in a case such as this, and that the precedents relied upon by Appellees and the court below against the Teachers were inapposite. T. at 199-214. Appellees have not really met these contentions at all. They have resorted in effect to a confession and avoidance by declaring that the Union's "rebate procedure" will cure the invasions of the Teachers' rights which are bound to occur under the agency-shop here involved.

We do not believe that this Court should or will countenance so blatant a subversion of the Teachers' civil rights and civil liberties.

ARGUMENT

I.

Despite the agreement of all concerned that the PERA agency-shop provision is unconstitutionally overbroad, and despite Appellees' failure to meet the Teachers' contention that public-sector collective bargaining is inherently political, the Union and the Board seek to induce this Court to endorse a procedure designed to vitiate, rather than to vindicate, the Teachers' First- and Fourteenth-Amendment rights.

The unique aspect of this case is that no serious arguments on behalf of the constitutionality of the PERA agency-shop have been presented to this Court. Rather, all concerned agree that the provision is unconstitutionally overbroad on its face — because (in the words of the Michigan Court of Appeals) as a matter of state law it clearly "sanctions the use of nonunion members' fees for [partisan-political] purposes" (A. 101). The only points of disagreement are two: *First*, between the

position of the Teachers that, because the statute is unconstitutionally overbroad, therefore its enforcement should be enjoined; and the position of the Michigan Court, Appellees, and their Amici that, although the statute is unconstitutionally overbroad, nevertheless it should be upheld because its infringements of the Teachers' First- and Fourteenth-Amendment rights may supposedly be "cured" by *ex post facto* awards of "restitution" or "rebates". Contrast T. at 200-14 with U. at 9-13, N. at 57-61, and X. at 11-13. Second, between the position of the Teachers that the overbreadth of the statute is pervasive, because of the inherently political nature of compulsory collective bargaining in the public sector; and the position of Appellees and the Amici that public-sector bargaining is indistinguishable from its private-sector counterpart, in so far as its political attributes are concerned. Contrast T. at 62-78, 164-76, with U. at 31-40, N. at 49-57, and X. at 28-31.

In this Part we shall expose the fallacies and perversities in these assertions of Appellees and their Amici.

A.

The Union, the Board, the Teachers, the Amici, and the Michigan Court of Appeals all agree that the PERA agency-shop scheme is unconstitutionally overbroad.

No one denies that the Michigan Court of Appeals squarely held, as a matter of statutory construction under Michigan law which is binding here, that: (i) the PERA agency-shop provision "*does not limit*" the uses to which the Union may put coerced fees, and "*sanctions*" the expenditure of those fees for "political activities"; and (ii) unlike the Railway Labor Act, which this Court interpreted in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), so

as "to deny railroad unions the right, over the employee's objection, to use his money to support political causes which he opposes", the PERA agency-shop "statute * * * *admits of no such construction*" (A. 101) (emphasis supplied). See U. at 10; N. at 57; X. at 14. Neither does anyone deny, as the Michigan court noted, that "[t]he [partisan] political activities of unions are well-recognized", or that "[i]t is reasonable to assume that at least a portion of every union's budget goes to * * * support of candidates sympathetic to the union cause and lobbying for the passage of bills in the legislature" (A. 101). Indeed, by belatedly injecting into this case its so-called "administrative rebate procedure", the Union brazenly represents to this Court its intention anticipatorily to invade the Teachers' First- and Fourteenth-Amendment freedoms, in (as we shall show) an irremediable fashion, precisely by expending their agency-fees for "activities or causes of a political nature or involving controversial issues of public importance".¹ U. at 11; cf. N. at 57 n.18; X. at 11 & n.4.

What Appellees, their Amici, and the Michigan Court do deny, however, is that such spending, *in and of itself*, is unconstitutional, and that, therefore, the statute which empowers the Union to engage in it is also unconstitutional *per se*. But these denials are frivolous. The Teachers do not complain that the agency-shop merely deprives them, for some length of time, of the use and enjoyment of monies, a right to the possession of which the Union has not been required to, or cannot, establish. Contrast *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 343 (1969) (Harlan J., concurring). The Teachers' claim is not concerned, in any

¹ Appellees tell the Court that this procedure is provided in "bylaws recently adopted" by the Union. U. at 11. What they do not say is that these new bylaws were not adopted until June 3, 1976. *The Detroit Teacher*, Sept. 28, 1976, at 7, col. 1. Apparently the Union finally realized the desperate state of its case *after* this Court noted probable jurisdiction on April 26, 1976. 96 S. Ct. 1723.

dispositive sense, with mere property interests. Rather, their claim asserts that, when the Union expends agency-shop fees coerced from them under color of state law in support of its political and ideological activism, *that spending, in and of itself*, abridges their First- and Fourteenth-Amendment freedoms of speech and association, and their political autonomy (A. 13-14, 48-50) — because, in Mr. Justice Brennan's words, any such "assessment of [a public employee's] salary is tantamount to coerced belief". *Elrod v. Burns*, 96 S. Ct. 2673, 2681 (1976). Thus it is the *spending* which creates the unconstitutional prior restraint upon their freedoms, of which the Teachers complain. And it is the *spending* of their confiscated monies which the Teachers seek, and are entitled, to have arrested by an injunction against enforcement of the PERA agency-shop scheme.²

Therefore, the argument of Appellees and their Amici, that the decision of the court below has afforded the Teachers all the relief to which they are entitled, is specious and disingenuous. See U. at 10; X. at 11; cf. N. at 57-58. The decision holds that dissenting Teachers who "protest" to the Union the unconstitutional expenditure of their agency fees may (under some undefined conditions) receive "restitution" of the illegally spent monies — but may *not* have enforcement of the agency-shop itself enjoined (A. 103-04). Since, however, the spending *is* the constitutional violation, irrespective of whether the illegally spent money is returned, the existence of a scheme for "restitution" of part or all of the fees is beside the point. "Restitution" could be required only *after* such rights have been abridged. But *after* the rights have been abridged, the damage is done, and cannot be

²It would be nonrational and unjust in this case for the injunction merely to prohibit *spending* of the agency-fees, and not their *collection* as well. If only the spending were enjoined, the Union could still proceed to collect monies to which it was not entitled, requiring the Teachers to initiate yet another lawsuit to secure their rightful *property* interest in their own wages.

repaired. See *Elrod*, 96 S. Ct. at 2689-90 & n.29 (opinion of Brennan, J.).

In short, the "right" to "restitution" which Appellees so misleadingly assert on pp. 10-11 of their brief as now "recognized by Michigan * * * and preserved by the governing rules and bylaws of the Union itself" is a "right" the recognition of which does not "avoid" the violation of the Teachers' First- and Fourteenth-Amendment liberties worked by the agency-shop. Rather, it ignores the issue central to this appeal. The statute *sanctions* unconstitutional political spending at the option of the Union. The spending causes *irreparable* injury to the Teachers. Therefore, even if it also sanctions constitutional spending by the Union (which the Teachers deny), *the statute* is unconstitutional, and its operation enjoinable, on grounds of overbreadth — whether the Union "rebates" the coerced fees or not.

And thus, the real issue here being the unconstitutional Union spending sanctioned by the PERA agency-shop, Appellees' case utterly collapses. For they have not made, and could not honestly make, an attempt to justify a statute which permits the Union to extract "forced loans" from dissenting Teachers, to apply these "loans" to political and ideological activism, and then to demand that *the oppressed Teachers* "protest" their own oppression before a tardy and inadequate "rebate" is offered to them.

Yet, while the Teachers must prevail on the overbreadth issue, the importance of this case (as evidenced by the indefatigable attempts of Appellees and their Amici to disguise, distort, and draw attention away from the real issue *sub judice* here) compels us to answer other of their arguments bearing on the "political-spending" question. And to these, we now turn.

B.

The inherently political character of public-sector collective bargaining, established by the Teachers and ineffectively challenged by Appellees, makes injunctive relief the uniquely appropriate remedy in this case.

There is no need to add further documentation to the Teachers' exhaustive demonstration that public-sector collective bargaining is an *inherently political* process. T. at 63-76. Rather than seriously contesting this conclusion, Appellees have sought merely to avoid its impact through the most transparent of double-talk. Appellees' main ground for contending that public-sector collective bargaining is *not* inherently political seems to be that all the highly qualified persons who have asserted that public-sector bargaining is inherently political nevertheless favor it. U. at 36-39. The rational relationship between these two propositions completely escapes us. It is the same as saying that because many experienced smokers agree that a cigarette has a fine taste, it is therefore not dangerous to health.

But let Appellees speak for themselves, as when they claim that "[f]ar from characterizing the public employee union's bargaining as political, Professor Summers views the process as necessary to counteract the political pressure upon the *other* party at the bargaining table". U. at 38. As if a set of special statutory privileges which enables the Union "to counteract * * * political pressure" is not *ipso facto* a grant of peculiar *political* influence; and as if Professor Summers himself had not noted, *in a passage which Appellees themselves quote with approval*, that "[i]ntroduction of collective bargaining into the public sector alters the governmental process"! U. at 38 n.30. Apparently, Appellees would have this Court understand that a system which *they admit* affords unions special *political* power, and fundamentally alters the *governmental* process, is (notwithstanding these effects) neither

political nor *quasi-governmental* in character — because *they* prefer to call it "bargaining", in furtherance of their desire to discourage constitutional scrutiny of the agency-shop. Here, surely, is an attempt at "labelling" even more impermissible than those others which this Court has uniformly rejected in the past. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830).

Amicus NEA at least tries to challenge the Teachers' conclusion that public-sector bargaining is inherently political. N. at 49-57. The Amicus correctly notes that, in *Street*, this Court distinguished between partisan political activity (such as lobbying and electioneering) and collective bargaining under the Railway Labor Act. 367 U.S. at 768-69 & n.17. But the *Street* majority did not thereby establish an abstract and absolute dichotomy between "political action", on the one hand, and "collective bargaining", on the other. It merely applied the obvious distinction between Union activity directed towards influencing and controlling *government*, and activity directed towards influencing and controlling *private employers*. In *this* distinction, the Teachers readily concur — because their case rests upon the logical impossibility of distinguishing *government* as the embodiment of the political process from *government* as a participant in an imaginary nonpolitical process of collective bargaining. *Government*, after all, is inescapably a — indeed, *the* — *political* entity, exercising *sovereign* (not "private", or "economic") authority even when it deals with mundane matters of setting wages and hours for its employees. *See National League of Cities v. Usery*, 96 S. Ct. 2465 (1976). Nothing can change this fact, or the implications it has for constitutional law, even if (as the NEA asserts) "[t]he cause which has led to the formation and growth of public employee unions is identical to that which prompted the organization of private sector workers". N. at 53. For it is not how *unions* view public (and private) employers which determines how the Constitution should apply to the activities of those employers, but instead

how *the Constitution* limits (or fails to limit) the freedom of public (and private) employers in dealing with unions which determines how far those employers may go in permitting unions to coerce ideological conformity among nonunion employees. In short, the NEA conveniently forgets that there is an unalterable constitutional distinction between private and state-action. But to forget *that* distinction is to beg the fundamental question raised by this appeal. T. at 10-62.

Nevertheless, if Appellees and their Amici cannot see, or refuse to admit, the inherently political nature of public-sector bargaining, others are less myopic, or less stubborn. We have already pointed out that the Michigan Supreme Court views public-sector collective bargaining in that state as inherently political. T. at 65-66. More recently, in *City of Stamford*, Case No. MPP-3381, Dec. No. 1421 (1976), the Connecticut State Board of Labor Relations also held that

“[t]here is a political aspect of collective bargaining in the public sector that has no counterpart in private bargaining.” *City of Hartford* (Police and Fire), Case No. MPP-3117, Dec. No. 1353 (1975). See also *City of Shelton*, Case No. MPP-2946, Dec. No. 1344 (1975). So far as the cost of a bargain goes, the [Municipal Employee Relations] Act itself puts the ultimate control of the purse strings in the people through their elected representatives. * * * What this means is that the final phase of the collective bargaining process will often be left to the political process where (as here) the chief bone of contention is the cost of meeting (or partly meeting) union demands.

* * * * *

We clearly recognized in the *Hartford* case that “the way to counteract [unfavorable statements by a legislator] is by political means” and that public employees must put up with public attitudes in a democracy “if the employees cannot change the attitude by political means.” If the people control the purse strings in the last

analysis then it is part of the bargaining process to try to persuade the people to loosen them and under our system this is done through the ballot — by voting for officials and legislators who will be more likely to accede to or compromise with union demands.

From this it follows that political activity may well be an integral part of the bargaining process. It is so where it is directed toward the election of officials and legislators who are thought to more (or less) be favorable to union demands in pending labor negotiations. When political activity is of this kind it is among the “concerted activities for the purpose of collective bargaining” which employees have the right to engage in “free from actual interference, restraint, or coercion.”

But if, as the Connecticut Board held, such partisan, electoral “political activity may well be an integral part of the bargaining process”, what rational distinction remains between public-sector “bargaining” and “politics”? How can a category of *nonpolitical* public-sector bargaining be defined?

We submit that such a category is logically nonexistent. And therefore, *all* coerced financial support of a union engaged in public-sector bargaining is necessarily a violation of the First- and Fourteenth-Amendment liberties of dissenting employees, by hypothesis. That is, the overbreadth of the PERA agency-shop is, in the nature of things, *pervasive* and *incurable*. And such pervasive overbreadth can be attacked and remedied *only* by a sweeping injunction, invalidating the scheme on its face. For the alternative of a protracted case-by-case approach would only exacerbate the statute’s inhibitory effect on First- and Fourteenth-Amendment liberty, even if it were reasonable (which the Teachers deny) to assume that, under some as yet undefined and extraordinarily narrow circumstances, the agency-shop might be applied in a permissible manner. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 372-79 (1964).

In sum, if Appellees wish to argue that, in some particulars which no observer has yet imagined, public-sector collective

bargaining is not political in character, the burden is on them and the Michigan Legislature to define those particulars with scrupulous care, and to enact and enforce only such statutory schemes of "union security" as are demonstrably limited to those particulars. This, they have not done. It is not the Teachers who should suffer continuous prior restraints upon, *inter alia*, their freedoms not to speak, not to associate, and not to petition simply because the Michigan Legislature has not seen fit even to attempt to enact a sufficiently precise and carefully tailored statute. Rather, it is the Union which should be denied the abusive and indefensible benefits of an overbroad infringement of the Teachers' rights, until it can teach that Legislature how to design a triangular square – a public-sector agency-shop scheme which passes muster under the First and Fourteenth Amendments. See T. at 87-93, 115-28.

C.

The "remedy" suggested by Appellees and the court below would exacerbate the existing invasion of the Teachers' First- and Fourteenth-Amendment rights.

Which brings us, finally, to the suggestion of Appellees and the Amici that, in the admitted absence of a narrowly drawn statute, a "remedy" of "restitution" or "rebate" for admitted violations of the Teachers' First- and Fourteenth-Amendment freedoms will suffice. We can but wonder at the contempt in which this suggestion holds the long and unbroken series of decisions of this Court which teach that First-Amendment rights, above all others, must be afforded the most unstinting and uncompromising protection, whatever the price. For what is suggested here, bluntly put, is that this Court simply *disregard* the admitted unconstitutionality of the PERA agency-shop, because otherwise the complete vindication of the Teachers' First- and Fourteenth-Amendment rights might prove too financially costly to the Union.

Appellees, for example, preposterously assert that the Michigan court actually "upheld" the Teachers' rights because its suggested "remedy" of "restitution" "clearly bars the political use over their objection of appellants' agency shop payments". U. at 10 (footnote omitted); *accord*, X. at 11. In reality, the "remedy" of "restitution" assumes that the Union *will* expend the Teachers' agency-fees for illegal "political uses", *not* that such spending will be "barred". *It assumes the existence of the constitutional violation*, and then meekly "penalizes" the Union by requiring it – *if* the Teachers make a sufficient "protest" – to disgorge the "forced loan" it earlier coerced from them. See A. 103-04. But it in no way addresses the *irreparable* injury caused by the promulgation of ideas, the promotion of causes, the electioneering for candidates, the mobilization of legislative forces, and the purveying of other official influence on which the Union may expend the Teachers' agency-fees. T. at 206-14. What sort of "remedy" is this, then? The very sort of "remedy" which this Court unequivocally indicated in the *Miami Herald* case "fails to clear the barriers of the First Amendment". *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Amicus NEA argues (even more fallaciously) that the Michigan court's "restitution remedy" has "provided a way in which the unconstitutional application of the statute [can] be severed". N. at 58. Besides distorting beyond recognition what the Michigan court really held in this case, this statement simply reads the "overbreadth-vagueness" doctrine out of constitutional jurisprudence. *Contrast Baggett v. Bullitt*, 377 U.S. 360, 372-79 (1964). And the NEA's further conclusion (with which Appellees and the other Amici agree) that the "restitution remedy" is a "determination of state law" which this Court must blindly follow truly borders on the absurd. N. at 60-61; U. at 10 & n.8; X. at 11-12.

Three questions were before the Michigan Court of Appeals. *First*, does the PERA agency-shop provision, as a matter of *state* law, place any limits on union spending of

coerced agency-fees? To this question, the court responded that the statute does *not* prohibit, but rather *sanctions*, union partisan-political spending (A. 101). *Second*, does union partisan-political spending of agency-fees, as a matter of *federal* law, violate the Teachers' *constitutional* rights? To this question, the court responded with the Delphic utterance that "the agency shop clause * * * could violate plaintiffs' First and Fourteenth Amendment rights" (A. 102). *Third*, what is the proper remedy, as a matter of *federal* law, for the violation of *federal constitutional* rights sanctioned by the PERA agency-shop? And to this question, the court responded that "restitution" affords sufficient relief (A. 103-04). Thus, the Michigan court opined that "restitution" is a "remedy", not for a violation of the *agency-shop statute*, but for a violation of the *federal Constitution*. The "relief" it fashioned was directed towards securing *federal* rights, not any rights which exist only under state law. Therefore, contrary to Appellees' contention, this Court is not bound to give *any* deference to the Michigan court's decision on the "remedy" issue. On the one hand, if that decision is taken as an interpretation of what state law permits as the sole available means to vindicate federal rights, the Appellees' contention flies in the face of the Supremacy Clause. U.S. Const. art. VI, cl. 2. This Court need not slavishly follow state law when that law purports to declare the unique mechanism by which federal rights can be preserved — or, as here, eviscerated. *E.g.*, *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). On the other hand, if (as we believe is the better view) the Michigan court's decision is taken as a misapplication of the principles of federal *statutory* law enunciated in *Street* to a problem of federal *constitutional* law not present in that case, the Appellees' contention flies in the face of Article III. This Court is not bound to follow faulty constructions and applications of its own decisions by the state courts. *E.g.*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 621 (1936) (Hughes, C.J., dissenting).

Moreover, even if the "restitution remedy" were a binding determination of state law, it would not rule this case — since (as we have already shown) the "protest" requirement and "restitution" scheme themselves constitute prior restraints as invasive of the Teachers' First-Amendment rights as the unconstitutional spending they are proffered to "cure". T. at 87-93, 209-10. Furthermore, the "protest" requirement and "restitution" scheme suffer from an even more fatal defect. No one denies that it is unconstitutional for the Union to expend coerced agency-fees on partisan political activities. What *legitimate* state interest, then, justifies a statute which *sanctions* the collection and expenditures of those fees for *unconstitutional purposes*, and in addition requires the victims of this oppression to "protest" to their oppressors as a precondition to the return of monies which should never have been seized and expended in the first place? What "rational basis" exists for imposing upon the Teachers, not only these burdens, but also the concomitant financial costs of asserting the "rights" to "protest" and to receive "restitution" in the Michigan courts? None, we submit. The state has no *legitimate* interest in conditioning the Teachers' public employment on their acquiescence in such a system of prior restraints, presumed "waivers" of constitutional rights, and financial penalties for asserting freedoms which our Constitution holds beyond all infringements. *See, e.g.*, *Elrod v. Burns*, 96 S. Ct. 2673, 2682-83 & n.13 (1976). For that reason alone, the agency-shop (even with the "remedy" of "restitution") fails to satisfy the "mere-rationality" requirement of the Due Process Clause of the Fourteenth Amendment. *Cf.*, *e.g.*, *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

The Union and its Amici, however, are not satisfied with merely manifesting their contempt for the logic and teaching of the First Amendment. No; having drunk too long and too deeply at the legislative well-spring of special privilege, they incautiously dare to attempt to deceive this Court into

granting them prerogatives still more abusive and indefensible than they now enjoy under the PERA agency-shop. We refer, of course, to the argument that the Teachers should be required to submit themselves to the Union's internal "administrative rebate procedure" as a precondition to the assertion of their own federal constitutional rights. U. at 11-12; N. at 57 n.18; X. at 11 & n.4. How (in good faith) Appellees can advance this argument when, later in their brief, they claim that "the agency-shop allows the employee only to pay his pro-rata share without actually becoming a union member and subjecting himself to union rules and discipline", we cannot understand. U. at 21. Perhaps they have mastered the technique of "doublethink", whereby one holds two mutually contradictory ideas simultaneously in mind, believing both of them to be true. Or perhaps they mean only that the Teachers need not become union members and subject themselves to union rules and discipline except in so far as they desire to preserve their First-Amendment freedom from coerced political and ideological conformity. In any event, their argument proves what we have contended all along: namely, that the logic of the agency-shop, if carried to its full extension, requires dissenting employees to submit themselves, and their basic liberties, to union dictation. T. at 105-10. Indeed, what have we here except the strident voice of special privilege denouncing the liberties of those "nonpersons" who thwart its political designs, and demanding power to expose the Teachers' freedoms to the tender mercies of the very organization which broadcasts its intention to violate those freedoms?! If this be the appropriate "remedy", perhaps the Teachers would be well-advised to suffer the disease.

II.

This case is factually distinct from *Hanson* and *Lathrop* and therefore may not be ruled legally or constitutionally by those decisions.

Having conceded that the agency-shop provision is unconstitutionally overbroad, Appellees and their Amici nevertheless try to salvage the scheme by arguing that this case is somehow ruled by *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), and that these decisions are somehow adverse to the Teachers' position. In *Hanson*, the Court refused to hold unconstitutional on its face the agency-shop authorization of the Railway Labor Act, §2, Eleventh. In *Lathrop* the Court refused to hold unconstitutional on its face a Wisconsin requirement that all members of the Wisconsin Bar contribute financial support to the bar association (an "integrated bar").

We propose in this Part to reiterate the sharp and material factual distinctions between this case and those. This case falls between *Hanson* and *Lathrop*. Whereas *Hanson* involved private employment, this case involves public employment; and, Appellees' asseverations to the contrary notwithstanding, an instructed person cannot contend in good faith that there is no substantial, significant, and material distinction between the two types of employment. Again, whereas *Lathrop* involved state-action compelling lawyers to support an agency of the State of Wisconsin as part of their duty to the judicial system, this case involves state-action compelling public-school teachers to support a private-association as a condition of employment; and, once again, no competent person can in good faith hold that these distinctions are insubstantial, insignificant, or immaterial.

We believe that we have anticipated in our main brief all the contentions of Appellees and their Amici which are based upon *Lathrop*. See T. at 51-56, 103-04, 175-76. We do wish

to reemphasize, however, that comparisons between lawyers as public officers and the Teachers as public employees cannot advance rational constitutional discussion in this case. *Pace X.* at 26-28. As officers of the courts, lawyers were highly regulated in their professional "associational" activities prior to 1791, as they have been since. Therefore, the freedoms secured to them on that date by the First Amendment *may* be somewhat narrower than (and certainly are different from) those which other citizens enjoy as mere employees of our public-school systems. *See, e.g., Theard v. United States*, 354 U.S. 278, 281 (1957); *Nebraska Press Association v. Stuart*, 96 S. Ct. 2791, 2823 n.27 (1976) (Brennan, J., concurring); *In re Sawyer*, 360 U.S. 622, 646-47, 665-69 (1959) (Stewart, J., concurring; Frankfurter, J., dissenting). (In any event, a judgment on the matter would require a careful historical investigation of the common-law status of the legal profession prior to the adoption of the Bill of Rights, together with a painstaking comparison-contrast analysis of that status to the status of public employees, both of which are out of place here.)

Moreover, the bar has always functioned subject to control and discipline by the judiciary itself. Bar associations, in so far as they fulfill public duties which justify compulsory membership, are not and have never been autonomous, self-regulating entities with independence anything like that exercised by contemporary public-sector unions from supervision by the employers of their members. To speak of "compulsory association" with the bar, then, is to forget that the position of an attorney, as an officer of the court, presumes "membership" in the judicial system — one part of which may be the bar association. *Cf. J. Dawson, The Oracles of the Law 34 et seq., esp. 42 et seq. (1968).*

Public-sector teacher-unions, in contrast, are not integrally related to the school boards and other official bodies for whom the teachers work. Rather, they are private, special-interest organizations, claiming a status separate from and

independent of the government. Therefore, it is valid to speak of "compulsory association" with such unions, since the position of a public-school teacher does *not* presume any connection to any private organization.

In short, this case can and should be decided without particular reference to the complicated problem so unsatisfactorily addressed in *Lathrop*. Once the controlling distinctions of fact and law between that case and this one are seen, the basic irrelevance of *Lathrop* to our situation becomes apparent.

We have also dealt at length with *Hanson* in our main brief. T. at 187-99. None the less, in view of the virtually total reliance of Appellees and their Amici upon that case, it seems desirable to reconsider their contentions and to recapitulate ours. Part III.B., *infra* p. 24.

III.

Appellees' unsupported assertions to the contrary notwithstanding, the constitutional distinction between public and private employment is basic, a vital feature of our legal system, and crucial to a proper disposition of this case.

One of the more astounding propositions advanced in Appellees' brief is that public employers share with private employers the constitutional liberty to condition employment contracts at will. Neither Appellees nor their Amici apparently are embarrassed by the fact that in order seriously to advance this proposition it is necessary studiously to ignore, among other bold features of American constitutional law, one of the most significant lines of cases developed by this Court during the past generation: the cases establishing the unconstitutional-conditions principle. *See* Part III.A., *infra* p. 23.

Appellees and the Amici seek to compensate for their disregard of the unconstitutional-conditions cases by the overwhelming emphasis they place upon *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). *Hanson* refused to invalidate a federal statute permitting private employers to make agency-shop agreements. It is distinguishable from the present case on several grounds — e.g., private employment was involved in *Hanson*, while here a public employer is involved. However, Appellees and the Amici insist that *Hanson* rules the present case despite that fundamental distinction, and in spite of other differences between the cases. See Part III.B., *infra* p. 24. What matters, they say, is that the Court found "state-action" in *Hanson*. If, notwithstanding the presence of state-action in *Hanson*, the agency-shop was upheld, then the agency-shop involved in the present case must likewise be upheld, according to Appellees. The problem with this argument, of course, is that besides overlooking certain features of *Hanson* which should not be disregarded, it pushes the holding of *Hanson* to a point which makes it necessary for this Court to overrule either *Hanson* or its unconstitutional-conditions cases. For the Court may not rationally hold *both* that public employers may *not* condition employment on a waiver of constitutional rights — *and* that public employers *may* condition public employment on a waiver of the right not to join or support unions. We repeat here in Part III.B. the suggestion made in our main brief: the only way to reconcile *Hanson* with the unconstitutional-conditions principle is to confine *Hanson* narrowly to its facts, as Justice Douglas, the author of *Hanson*, suggested in his dissenting opinion in *Lathrop v. Donohue*, 367 U.S. 820, 884 (1961).

We respectfully submit that if *Hanson* is not distinguished, and a choice must be made between *Hanson* and the unconstitutional-conditions principle, the latter must be preferred. The consequences of destroying the constitutional distinction between private and public employment, between

the conduct of private persons and that of agencies of the state, would be far-reaching and shattering; those consequences would indeed replace our hopes for a system of ordered liberty with a meaningless choice between chaos and tyranny. See Part III.C., *infra* p. 27.

A.

Appellees continue to ignore the unconstitutional-conditions doctrine and to assert with no support in either reason or authority that there is no constitutional distinction between public and private employment.

We observed in our main brief how scrupulously Appellees had avoided any reference to the Court's unconstitutional-conditions decisions. T. at 34-35. They, together with the NEA, persist here in that remarkably silent posture. Not a single reference to any of the unconstitutional-conditions cases is to be found in either of their briefs. One would suppose if his reading were limited to those briefs that this Court had never ruled that public employment may not be conditioned on a waiver or surrender of any right protected by the First and Fourteenth Amendments. The long, strong line of cases from *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Wieman v. Updegraff*, 344 U.S. 183 (1952), to last term's decision in *Elrod v. Burns*, 96 S. Ct. 2673 (1976), has apparently been relegated by Appellees and the NEA to the class of obsolete and irrelevant decisions.

Our opponents have chosen instead to advance the entirely anomalous contention that there is *no* constitutional distinction between public and private employment. See, e.g., U. at 14 *et seq.* We evaluate the implications of this contention in Part III.C., *infra* p. 27. Here we emphasize that neither Appellees nor the NEA make any attempt to justify their disregard of the basic constitutional distinction between governmental and private action. They offer neither reason

nor authority: only *ipse dixit*. But that is not enough to ground a revolutionary result — for the abandonment of the constitutional distinction between state-action and private action would indeed radically revise American political and legal institutions.

Their purpose in proposing the abandonment of the distinction is not hard to discern. Appellees and the Amici wish to avail themselves of *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and its holding that the Railway Labor Act was not unconstitutional on its face in permitting private railway companies to make financial support of unions a condition of employment. Although we dealt thoroughly with *Hanson* in our main brief, and though Appellees and the Amici have said nothing about the case that we had not already noted, their virtually total reliance upon *Hanson* makes it necessary for us at least briefly to consider their arguments anew. And to that task, we now turn.

B.

Appellees rely on a private-sector case — *Hanson* — as authority for the constitutionality of the agency-shop in public employment, notwithstanding that *Hanson* refused to uphold the constitutionality of the agency-shop unequivocally even in private employment.

Appellees and the Amici contend that *Hanson* settled all the issues here. U. at 18-23; N. at 16-25; X. at 19-20. However, as we have demonstrated at considerable length in our main brief, *Hanson* did no such thing. See T. at 187-99. Stretched to the limit, the holding there was only that §2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, Eleventh (1970), was not unconstitutional on its face in so far as it merely *permitted private employers* to condition employment on the payment of agency-shop fees to certified unions.

We recognized that the Court found “state-action” of a sort in *Hanson*. T. at 193-94.³ We pointed out, however, that there is an obvious distinction between a case involving only the *Railway Labor Act*, which merely permits private employers to do what they had a perfectly clear common-law right to do, and a case such as this in which: (a) a statute authorizes *state* employers to make financial support of a union a condition of employment; and (b) the public employer proceeds to threaten with discharge all public-school teachers who refuse to associate with the union in any form, including by way of payment of agency-shop fees. T. at 13-15, 191-94.

Such “state-action” as was at issue in *Hanson* did not impair any *constitutional* right to private employment free of any obligation to join or support a union as a condition thereof. In short, while there might be doubt in some states about the *legality* of compulsory unionism agreements at common law, there was no question of their *constitutionality*. T. at 13-15. Even the most extreme form of compulsory unionism, the closed shop, was invulnerable to constitutional attack in private employment. *Id.* Thus for Congress simply to “permit” private employers to condition employment in the private sector on a *milder* requirement could raise no issue *under the Bill of Rights*. It could, however, raise a question concerning the relations between Congress and the State of Nebraska, the state in which the case arose, because Nebraska had forbidden all forms of compulsory unionism. We therefore suggested in our main brief that it would be best all around to view *Hanson* as an application of the Supremacy Clause of the United States Constitution — as a consistent example of the pre-emption decisions which the Court was handling down in the 1950’s. T. at 194-95.

³ Amici AFL-CIO and UAW quote us as having suggested that “*Hanson* ‘is [solely] a pre-emption case’ ”. X. at 20 n.8. As in a number of other instances in the briefs on the other side, this is an incorrect account of our position. Cf. T. at 194.

That suggestion still seems sound. It is always best to avoid overruling decisions whenever possible. If *Hanson* is construed in the way that Appellees and the Amici demand, however, either it will have to be overruled, or the Court will have to create an anomalous exception to the unconstitutional-conditions principle. If *Hanson* is construed as validating the conditioning of public employment upon association with a union, it will be incompatible with all those decisions of this Court holding that public employment may not be conditioned upon a waiver or cession of rights under the First and Fourteenth Amendments — including a decision handed down as late as June, 1976: *Elrod v. Burns*, 96 S. Ct. 2673 (1976). Cf. T. at 21-61.

Appellees' reliance on *Hanson* is misplaced in another way. As our main brief points out, the author of *Hanson* and other members of the Court agreed that *Hanson* did *not* pass upon the constitutionality of all agency-shop authorizations even in the private sector. T. at 195-99. Justice Douglas said that "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case". 351 U.S. at 238.

Recognizing these facts about *Hanson*, even the court below refused to accept Appellees' contention that *Hanson* totally rules this case. According to the Michigan court, *Hanson* "did not consider whether or not funds collected pursuant to an agency shop clause could constitutionally be used for purposes unrelated to collective bargaining. That issue was not presented in *Hanson*, but it is squarely before us in the case at bar" (A. 100).

For two powerful reasons, then, *Hanson* may not properly be considered authority against the Teachers. In the first place, even though it might be considered a "state-action" case of sorts, it quite clearly did not have anything to say about the constitutional rights of public employees. In the second place, it expressly stated that if in authorizing the agency-shop in private employment Congress also authorized

unions to use agency-fees for political or ideological purposes, a serious constitutional question not presented by the *Hanson* record would have to be confronted. That the Court meant what it said is borne out by the device it utilized in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), to avoid the constitutional issue left open in *Hanson*. The Court in *Street* construed §2, Eleventh of the Railway Labor Act as not permitting the use of agency-fees for political or ideological purposes. T. at 195-99. In the present case the Michigan statute has been authoritatively construed as *permitting* the very kind of exactions which the Court in *Street* held *not permitted* by the Railway Labor Act (A. 101-02). Therefore, it is impossible to see how either *Street* or *Hanson* has anything to contribute to the disposition of this case.

C.

Negating the long-standing constitutional distinctions between state-action and private action and between public employment and private employment, as Appellees seem intent upon doing, would amount to a radical revision of the United States Constitution and of the premises upon which it is based.

Appellees and Amicus NEA have taken the position that there is no material distinction between private-sector and public-sector collective bargaining. U. at 31-40; N. at 49-57. Beyond that, they contend that public agencies enjoy the same freedom of action in the employer-employee relationship that private employers do. As far as Appellees and the NEA are concerned, the historic distinction between state-action and private action is without any real significance, and its abandonment of little moment.

We need not repeat here what we have said about this distinction in our main brief. No constitutional proposition is more firmly established than that "the state and federal

governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer". *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961). See T. at 10-17, 23-34. Appellees and the NEA are simply wrong, then, in asserting that since private employers are constitutionally free to enter agency-shop agreements, public employers must have the same liberty. This Court's unconstitutional-conditions doctrine stands as a monumental refutation of that fallacy. T. at 21-62. And the Court's decision late last term in *Elrod v. Burns* constituted a vote of confidence by *all* members of the Court, including the dissenters, in the continued vigor of the unconstitutional-conditions doctrine. 96 S. Ct. at 2682-85, 2690, 2693.

Abandoning the constitutional distinction between state-action and private action would produce momentous consequences. Consider some of them. Under the unconstitutional-conditions decisions of this Court — assuming they survived — private employers would be confined in the same way that public employers now are: they would be constitutionally disabled from conditioning employment in any way that would limit conduct of the kind privileged by the First and Fourteenth Amendments. The owner of a newspaper could not reserve employment to journalists who agreed to write as he ordered. A religious establishment could not employ only ministers who approved the doctrines it espoused.

Conversely, if Appellees and the NEA are correct in saying that private persons and states share identical status under the Constitution, then it would follow that whatever rights, powers, privileges, and immunities private persons have, governments also enjoy. So, since *under the Constitution* all private persons may admit or deny access to their private properties at will, it would follow under Appellees' conception that government agencies are similarly privileged. Likewise, since *under the Constitution* private persons enjoy freedom of contract — may, in brief, act as whimsically as

they wish in contracting or refusing to contract — it follows under Appellees' theories that governments too may whimsically choose to deal only with Democrats, or Baptists, or members of the white race, or conservatives, or socialists, or anyone else, as they please.

Still again, and still more paradoxically, if Appellees are correct in contending that there is no constitutional distinction between the privileges and immunities of private persons and those of governments, then since governments have the power to compel obedience to their laws, the power to tax, and even the power to draft the citizenry, it would follow that private citizens also have legal power to compel others to obey their mandates, to exact money contributions by force from others, and to force others to work for them.

Quite obviously, accepting the theories of Appellees and the NEA would make a shambles of the law and the Constitution of the United States. It would create a new juridical structure, one heretofore unknown, not only in America but in any legal order that ever existed or could exist.

IV.

Appellees have misunderstood *Letter Carriers, National League of Cities*, and certain other cases from last term that they have cited in support of their position, and have ignored the one decision late last term — *Elrod v. Burns* — which is directly in point and which constitutes overwhelming authority in favor of the Teachers.

One of the sure signs of a weak legal position is the use of inapposite precedents and the omission of apposite ones. Appellees' brief demonstrates this weakness. It spends considerable time on *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), and a number of other decisions handed down late last term and on *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973). But it ignores *Elrod v. Burns*, 96 S. Ct. 2673 (1976), a case also handed down near the end of last term.

It would be inaccurate to say that *National League of Cities*, *Letter Carriers*, and the other decisions of last term upon which Appellees dilate have nothing at all to do with this case. On the contrary, those cases do relate in a material, through incidental, way to this one (a way, however, precisely contrary to Appellees' contention). See Parts IV.A. & IV.B., *infra*.

But the matter of large significance here is that while the cases Appellees emphasize have some minor relevance to this one, the case they ignore — *Elrod v. Burns* — is so close to this one in terms of both fact and constitutional principle that it seems just to describe it as "on all fours". Moreover, and this more than likely explains Appellees' attitude of *ignorabimus* toward the case — for we can scarcely believe that so able and conscientious a lawyer as Appellees' could have overlooked it — *Elrod v. Burns* powerfully reaffirms the vitality of the unconstitutional-conditions principle, is in some ways a weaker case for the public-employees involved than this one but still holds for them, and therefore makes the Teachers' case here an *a fortiori* one. See Part IV.C., *infra* p. 35. No wonder Appellees ignore it. They have prudently taken to heart Ludwig Wittgenstein's injunction: "Whereof one cannot speak, thereof one must be silent".⁴

A.

Appellees have misunderstood the relevance to this case of *National League of Cities* and the other decisions handed down late last term to which they refer.

Towards the end of last term, this Court handed down a number of decisions which, taken all in all, recognized a

⁴*Tractatus Logico-Philosophicus* §7.00 (1961 ed.) (also translated as "What we cannot speak about we must pass over in silence."). The original is: "Wovon man nicht sprechen kann, darüber muss man schweigen."

degree of autonomy in state and local governments as regards the formulation and administration of public-employment policies and practices. Appellees recount the following decisions, apparently regarding them as favorable to their position: *City of Charlotte v. Local 660, Fire Fighters*, 96 S. Ct. 2036 (1976); *Crestwood Education Association v. Board of Education*, 96 S. Ct. 3184 (1976); *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 96 S. Ct. 2308 (1976); *Kelley v. Johnson*, 96 S. Ct. 1440 (1976); *Board of Retirement v. Murgia*, 96 S. Ct. 2562 (1976); *McCarthy v. Civil Service Commission*, 96 S. Ct. 1154 (1976); *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976); and *Vorbeck v. McNeal*, 96 S. Ct. 3160 (1976). See U. at 14-18.

Appellees have misunderstood the relationships between the foregoing decisions and the present case. Consider, for example, the decision in *National League of Cities v. Usery*. There this Court held that the 1974 amendments of the Fair Labor Standards Act were unconstitutional in so far as they purported to regulate the wages and hours of public employees in the states and localities. According to Appellees and the NEA, *National League of Cities* establishes the proposition that the states are free to do just about anything they wish so far as their employment relations are concerned. U. at 15, 36; N. at 28, 46.

But it is difficult to see how the meaning of *National League of Cities* could be distorted more egregiously. It does not follow from a holding against congressional invasion of state sovereignty over employment relations that the states are free of all restraints so far as those relations are concerned. Would Appellees contend that since *National League of Cities* the states are constitutionally authorized to restrict public employment only to blacks, or Baptists, or members of the Ku Klux Klan, or contributors to Common Cause, or union members, or such persons as agree not to join or support unions? How would Appellees apply *National League of Cities* to a state statute prohibiting union membership to all public

employees? Would it regard such a statute as immune to all constitutional review merely because *National League of Cities* has intimated that Congress could not pass such legislation for the states? Cf. *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969), and T. at 34-46.

We respectfully submit that — contrary to Appellees' contentions — the decisions handed down late last term are burdened with powerful intimations *against* Appellees. Those decisions do indeed on the whole recognize considerable authority in the states to govern their own employment relations. That authority, the Court made clear, is implicit in the sovereign powers retained by the states. However, in emphasizing the continued sovereignty of the states over their own employment relations, the Court could not have intended to suggest that the states are authorized to delegate, dissipate, or squander that sovereignty at will. On the contrary, "sharing" their sovereignty over employment relations with unions is laden with constitutional issues of the gravest kind. *National League of Cities* holds that Congress may not invade that sovereignty. Do unions have a greater power than Congress to usurp the sovereignty of the states? See T. at 176-86.

Again, not a line in the decisions late last term may fairly be construed as abandoning or even limiting the unconstitutional-conditions principle which constitutes the basis of the Teachers' case. T. at 18. Each of those decisions harmonizes readily with the principle that no government in this country may condition public employment on a waiver of rights protected by the First and Fourteenth Amendments. The states and localities may to some degree enjoy immunity from congressional control. But all government in this country is subject to constitutional restraint. That is the meaning of constitutional government.

While recounting so many of the last term's decisions, Appellees did not see fit to mention *Elrod v. Burns*, 96 S. Ct. 2673 (1976), although it is practically "on all fours" with the present case. See Part IV.C., *infra* p. 35. The most notable

feature of *Elrod* lay in its reaffirmation of the unconstitutional-conditions principle. Adding it to the decisions which Appellees saw fit to notice, we get a clear message from the Court, one which may be phrased as follows: The states have sovereign powers and responsibilities in respect of their employment relations — powers and responsibilities which neither Congress nor trade unions may displace or usurp; however, those powers, like all governmental powers, must be exercised compatibly with constitutional restraints, especially restraints imposed by the Bill of Rights and the Fourteenth Amendment.

B.

Appellees have misunderstood the *Letter Carriers* decision and its relationship to this case.

In *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), this Court upheld the constitutionality of the Hatch-Act limitations on organized, partisan-political activities of federal civil servants. However, the case did not hold that the government might deny *all* political rights to civil servants. No one can reasonably doubt after reading the opinion that the Court would have invalidated any statute denying civil servants the right to vote, to join and support political parties, and to express their own opinions as individuals on all political issues. It goes equally without saying that the Court would have struck down the Hatch Act if it had made membership in or contributions to any political party a condition of federal employment. See *Elrod v. Burns*, 96 S. Ct. at 2689 n.28 (plurality opinion of Justice Brennan).

As noted in our main brief, *Letter Carriers* stands for the well established proposition that government may require civil servants to abide by all rules reasonably related to the functions they perform and to preserving the integrity of government itself. T. at 25, 114, 172-75; cf. *Washington v.*

Davis, 96 S. Ct. 2040, 2050-53 (1976); see also T. at 31-34. We are reassured in our interpretation of *Letter Carriers* by Mr. Justice Brennan's construction of it in *Elrod*. Referring to *Letter Carriers* and to *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), Justice Brennan said that "[i]n both of those cases, legislative restraints on political management and campaigning by public employees were upheld despite their encroachment on First Amendment rights because *inter alia*, they did serve in a necessary manner to foster and protect efficient and effective Government". 96 S. Ct. at 2686 (footnote omitted).

Appellees' reliance upon *Letter Carriers* is thus misplaced. U. at 17, 42-45. *Letter Carriers* might be regarded as authority for Appellees if they could prove that compelling the Teachers to support the Union would somehow enhance their performance as public-school teachers or better enable the public-school system to carry out its educational functions. In view of the sorry record of teachers' strikes in the period during which teachers' unions have expanded, and the less-than-flourishing condition of all heavily unionized school systems, it is difficult to see how Appellees could provide such proof. Cf. Public Service Research Council, "Public-Sector Bargaining and Strikes", *Gov't Employee Rel. Rep.* No. 676, at F-1 (Sept. 27, 1976); T. at 153-64. Indeed, as one scholar has specifically remarked on the situation in Michigan's public schools,

[t]eacher bargaining units have been in the forefront of public employee groups in using the strike weapon to enforce their demands. An average of 4.7 percent of the school districts have faced teacher withdrawal of services each year since 1967. The high occurred when teachers in 9.6 percent of the school districts were on strike at some time during the 1973-74 school year.

Kornbluth, "Public Schools - Multi-Unit Common Bargaining Agents: A Next Phase in Teacher-School Board Bargaining in Michigan", 27 *Lab. L.J.* 520, 521 (1976).

Appellees have *not even attempted* to demonstrate how compelling the Teachers to support the Union could possibly

improve their performance as instructors or the Detroit school system as a vehicle of sound public education. Such being the case, there is no rational way Appellees can claim *Letter Carriers* as support for their position.

C.

In striking down patronage dismissals despite the weighty constitutional considerations favoring them, *Elrod v. Burns* is conclusive authority in favor of the Teachers, for *no* valid governmental interest has been advanced as justification for the abridgment of the Teachers' rights.

Late last term, this Court decided *Elrod v. Burns*, 96 S. Ct. 2673 (1976), in the way that in our main brief we said would establish the Teachers' case as an *a fortiori* one. T. at 39. The Court held that it was unconstitutional for an Illinois sheriff to impose as a condition of continued employment in his department a requirement that existing (nontenured) employees "pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, *contribute a portion of their wages to the Party, or* obtain the sponsorship of a member of the Party, usually at the price of *one* of the first three alternatives". 96 S. Ct. at 2681 (plurality opinion) (emphasis supplied).

The Court held that each of the foregoing requirements, *including the requirement of financial support to the Democratic Party*, infringed the associational, political, and speech-rights of the employees involved. We contend here similarly that compelling the Teachers financially to support the Union violates their associational, political, and speech-rights. Like the Union in the present case, the sheriff in *Elrod* sought to justify his action by contending that "[t]he party organization makes a democratic government work and charges a price for its service". *Id.* at 2687 (footnote

omitted). But the Court found this contention unpersuasive. Although it saw some value to the democratic process in patronage dismissals, the Court considered that value far outweighed by their tendency to impair "the associational and speech freedoms which are essential to a meaningful system of democratic government". *Id.* at 2688. In this case, we earnestly contend that no comparable value is served by compelling the Teachers to contribute financial support to the Union, and that therefore this is a stronger case for the Teachers than *Elrod* was for the sheriff's subordinates.

Elrod uncannily recapitulates every important phase of this case. Just as the Union argues here that the Michigan PERA's invasion of the Teachers' rights is justified by the needs of the Union if it is to carry out its "duty of fair representation", so too did the sheriff in *Elrod* contend that forcing adherence to the Democratic Party, though an infringement of free association, was justified because it strengthened the Party. Speaking for the plurality, Justice Brennan rejected this rationalization. "In the instant case", he said, "care must be taken not to confuse the interests of partisan organizations with governmental interests". As justification for incidental invasions of First-Amendment rights, Justice Brennan concluded, "[o]nly the latter will suffice". *Id.* at 2684.

We have already noted how *Elrod* confirms our conception of the relationship between *Letter Carriers* and the unconstitutional-conditions principle. See Part IV.B., *supra* p. 34. The cases establishing this principle themselves emphasized that the civil rights of government employees could never serve as a cover for inefficiency or betrayal of their governmental responsibilities. T. at 31-34. Now, in *Elrod*, the Court has reaffirmed its conviction that while in the pursuit of bona-fide job-related requirements government may incidentally, and to the most limited possible degree, restrict constitutional rights, it may never directly invade such rights, as Michigan has done

in this case, without a showing that the invasion serves a supremely powerful, overriding, governmental purpose.

Elrod also underlines the unique character of public employment which renders *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), and *International Association of Machinists v. Street*, 367 U.S. 740 (1961), irrelevant to this case. In *Street* the Court considered several possible remedies to safeguard the statutory right of dissenting railway employees to be free from coerced financial support of union political activities. Injunctions against the enforcement of the union-shop agreement and against all expenditures of union funds for political purposes were rejected, the former because it might interfere with the union's performance of its statutory functions and duties under the Railway Labor Act, the latter because it might work a restraint on the union's First-Amendment interest in publicizing its views on political candidates and programs. 367 U.S. at 771-73. But in enjoining patronage dismissals in *Elrod*, this Court held that subordination of the group First-Amendment interest in patronage to "the core interests of individual belief and association" was "mandated by the First Amendment" precisely because of the public-employment context:

Since patronage dismissals fall within the category of political campaigning and management, this conclusion irresistably flows from *Mitchell* and *Letter Carriers*. For if the First Amendment did not place individual belief and association above political campaigning and management, at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers*.

96 S.Ct. at 2688-89 (plurality opinion) (emphasis supplied). That the uniqueness of public employment was key to this holding is emphasized by Justice Brennan's note that the relative balancing of conflicting First-Amendment interests "in the setting of public employment * * * does not necessarily extend to other contexts". *Id.* at 2689 n.27.

We shall have more to say about *Elrod* later. For the present it is enough if we repeat that two cases more alike in principle than this and *Elrod* can scarcely be imagined; that *Elrod* obviously demonstrates the continued strength of the unconstitutional-conditions principle, upon which the Teachers rest their case here; and that in view of these two points, Appellees' absolute omission of any reference to it must be regarded as a tacit admission that they cannot think of any way to refute our contention that the unconstitutional-conditions principle requires this Court to decide in favor of the Teachers.

V.

While essentially conceding that the PERA agency-shop overbroadly infringes the Teachers' First- and Fourteenth-Amendment rights, Appellees fail to establish, to suggest, or even to acknowledge their ultimate burden to prove, in what way the infringement serves a compelling governmental interest; they demonstrate only that it serves a significant Union interest.

In our main brief, we showed that, even if this case were ruled by the "balancing" rather than the *per se* test, Appellees would have the burden to demonstrate with clear and convincing proof that the agency-shop serves some compelling state interest by the means least-restrictive of the Teachers' First-and Fourteenth-Amendment freedoms. And we pointed out that they have not carried, or even attempted to carry, this heavy burden of proof. T. at 115-47.

What Appellees and the Amici have done, as we predicted, is to retreat behind a smokescreen of arguments based upon the Union's status as an exclusive representative. See T. at 101-02. We are told, for example, that the constitutionality of exclusive representation (in both the private and the public sectors) has been repeatedly "recognized", "affirmed", "approved", or "upheld". U. at 41 & n.33; N. at 9, 31, 40-41.

That exclusive representation showers "benefits" on public employees, including the Teachers. U. at 29-31; N. at 11-16; X. at 45-50. That these "benefits" justify imposing the agency-shop in order to eliminate so-called "free riders". U. at 32-35; N. at 11-16; X. at 49-50. And that, all in all, the Union is doing nothing more than any other "government": namely, "taxing" those whom it "represents". U. at 21-23, 39; N. at 13; X. at 48-50 n.30, 52-53 n.33.

In our main brief, we recognized that the exclusive-representation device is not immediately in issue in this appeal — but that, none the less, this Court should consider carefully the consequences of relentlessly extending the logic of that device as has Michigan in the agency-shop. T. at 148-50. We did not argue, however, that, because the exclusive-representation device *may* itself be unconstitutional, therefore the agency-shop *is* unconstitutional. See T. at 101-02. That sort of *non sequitur* we left for Appellees and the Amici to advance (as they have) in the argument that, because the exclusive-representation device *might* be valid, therefore this Court *need not inquire at all* into the unconstitutionality of the agency-shop. And, since they have adopted this approach of avoiding and obfuscating the real constitutional issues raised here, we feel it incumbent upon ourselves, in this final Part of our reply, briefly to sweep away some of the mystery which has long insulated exclusive representation from disinterested scrutiny.

A.

Contrary to Appellees' claims, this Court has never passed on the constitutionality of exclusive representation in public-sector, or even private-sector, employment.

Appellees and their Amici no doubt wish the history of exclusive representation were other than it is. For, contrary to their imaginary descriptions of its legal evolution, exclusive

representation has *never* received the imprimatur of this Court, either in public- or private-sector employment. Indeed, no decision of this Court has given the device even a superficial, let alone a searching, constitutional examination. Rather, when the constitutionality of the National Labor Relations Act was first in issue, the Labor Board selected its test cases so as "intentionally [to] avoi[d] presenting the Court with the 'touchy' and more doubtful questio[n]" of exclusive representation. 1 J.A. Gross, *The Making of the National Labor Relations Board* 187 (1974).

Thus, when in *NLRB v. Jones & Laughlin Steel Corp.* an employer challenged that Act on various constitutional theories, the Court *avoided* the issue of exclusive representation by interpreting the bargaining scheme of §9(a) of the Act as "not prevent[ing] the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'". 301 U.S. 1, 45 (1937) (footnote omitted). Similarly, in a contemporaneous employer challenge to the Railway Labor Act, the Court held that the bargaining scheme of that Act also did *not* provide for absolute exclusive representation. *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937).

Seven years later, in cases raising only issues of statutory construction, the Court re-interpreted these Acts so as to preclude individual contracts between private-sector employers and their employees. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346-47 (1944). Neither of these decisions, however, reconsidered the issue of constitutionality raised in *Jones & Laughlin* and *Virginian Ry.*, although the statutory constructions adopted in the latter cases formed the necessary predicates for their constitutional holdings. E.g., Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 754, 789-91 (1940). The contemporaneous decision in *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), also failed to pass upon the

constitutionality of exclusive representation. For there, the Court created the "duty of fair representation" in order to *avoid* serious questions of due process and equal protection. *Id.* at 198. And, since 1944, no other case has arisen (before this term) in which the constitutionality of exclusive representation was implicated.⁵

Of course, we do not suggest here that this history necessarily indicates the unconstitutionality of exclusive representation in private-sector employment. Since *private* employers could condition employment on exclusive representation at common law, the inclusion of that device in the National Labor Relations and Railway Labor Acts raises difficult questions of state-action which must await a case other than this for discussion, let alone decision. Here, after all, the context is one of *public* employment, in which private-sector analogies and precedents have little weight; and in which exclusive representation is not directly in issue. None the less, we are not precluded from suggesting that this private-sector history certainly does not support any notion that the constitutionality of exclusive representation in public employment, with its special restraints on public employers, is "settled" – indeed, quite the opposite.⁶ And, if so, then this

⁵ As we pointed out in our main brief, aspects of the unconstitutionality of exclusive representation in public-sector employment are clearly raised in the pending case *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm'n*, *prob. juris. noted*, 96 S. Ct. 1408 (1976). See T. at 102, 159-60.

⁶ See *Knight v. Alsop*, 535 F.2d 466 (8th Cir. 1976), wherein it was held that *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), does not foreclose a challenge by public employees to the federal constitutionality of the Minnesota Public Employee Relations Act's exclusive-representation scheme – *both* because *Hanson* "did not resolve the validity of such a scheme", *and* because

Hanson was rendered in a private rather than a public sector collective bargaining context. Collective bargaining in public employment has been considered different from bargaining in private employment.

Knight, 535 F.2d at 471.

Court can give little credence to the argument that the existence of exclusive representation *strengthens* the PERA agency-shop. We submit now, as we did in our main brief, that that existence could caution this Court *even more searchingly* to investigate the constitutional infirmities of the agency-shop, so as not unnecessarily to extend a device now the subject of mounting criticism as incompatible with our social and political system.⁷

B.

Since exclusive-representative status is a special privilege redounding to the benefit of the Union, enhancing that status through the agency-shop at the expense of the Teachers' First- and Fourteenth-Amendment rights has no rational relationship to any compelling governmental interest.

Appellees and the NEA invoke mythology, rather than fact, not only with respect to constitutional history. Again and again they claim that exclusive representation is an "onerous burden" which the Union must bear, and from which the Teachers' reap ever-increasing "benefits". In their brief, Appellees tediously repeat how the Union "*must*" do this and

⁷See Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest L. Rev.* 515 (1976). Exclusive representation in the private sector has not been immune from recent searching critiques, either. Shaffer, "Some Alternatives to Existing Labor Policies", 27 *Lab. L.J.* 370, 371-76 (1976); Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?", 123 *U. Pa. L. Rev.* 897 (1975). Significantly, Mr. Justice Douglas and the Chief Justice suggested in their dissent from the denial of certiorari in *Buckley v. American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1095 (1974), that it was the *coupling* of "congressional permissiveness towards union shop agreements *** with the NLRA's 'exclusivity' principle" that raised substantial questions about the incompatibility of private-sector union-dues requirements with First-Amendment freedoms.

"*must*" do that. U. at 28. What Appellees and the Amicus do not mention, however, is that the status of the Teachers' exclusive representative was not thrust upon an unwilling Union by the State of Michigan, by the Board, or (least of all) by the Teachers. Rather, the Union avidly sought out that status.⁸

Indeed, teacher-unions such as the American Federation of Teachers and the National Education Association consider exclusive representation such an "oppressive duty" that they struggle violently against each other to expose themselves to it! For example, an article in *U.S. News & World Report*, Apr. 5, 1976, at 90, reports the existence of "A Teachers' War That's Costing Millions" between the AFT and the NEA. "Stakes are high", the magazine notes, "in a battle raging between the two teachers' unions. The real struggle is for power, not necessarily for better education". And on this organizing battle alone, *U.S. News* says, the AFT admits to "spend[ing] close to 30 million dollars a year". (Emphasis supplied.) In the light of these notorious facts, to say (as do Appellees and the NEA) that it is "only fair" for the state to compel the Teachers to finance the Union's costly activities as an exclusive representative, is an impermissible distortion of the truth.

If the truth be told, exclusive representation is, not a duty, but a special privilege after which unions lust. And a privilege which, in the nature of things, necessarily imposes a corresponding *duty* and *incapacity* on nonunion employees:

⁸Speaking of the Public Employment Relations Act which established exclusive representation as the rule in Michigan public employment, Appellees boasted to the Court of Appeals:

It is a matter of common knowledge that the enactment of that statute resulted in part from the legislative activities of school teachers and their organizations. It is a matter of equal knowledge that the preservation of that Act has depended in part upon vigilant legislative action by the same groups.

R., Brief of Defendants-Appellees, Mich. Ct. App., Jul. 19, 1974, at 25.

namely, the duty to acquiesce in an unwanted private organization as one's "representative"; and the incapacity to make one's own employment arrangements. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 200 (1944). Yet, after burdening *the Teachers* with this duty and incapacity for *its* own advantage, the Union then advances a further claim to compensation for extending and administering the original insult to their common-law and constitutional right to contract for themselves! To be sure, Appellees and the Amici rush forward with two pat rationalizations for this claim; but neither can withstand analysis.

On the one hand, they argue that "labor stability" in the public sector demands that nonunion employees be required to finance their exclusive representatives, lest the unions become "unnecessarily militant". U. at 33; N. at 36. We have already dealt in our main brief with the real meaning of this "labor-peace" theory, and its incompetence as a life-boat for Appellees' sinking case. T. at 137-47. Here we need only add that, even if the theory were admissible as a matter of law, as a matter of fact Appellees have introduced *no evidence* in the courts below as to the "stabilizing" effect of the agency-shop on public-sector labor relations. For instance, no comparisons are before this Court as to the number of strikes and other forms of work stoppages in states with public-sector agency-shops, as opposed to states without them. The Teachers, conversely, have pointed out that not only irrefutable statistics but also the logic of compulsory public-sector unionism indicate that the agency-shop contributes to more dangerously effective union *militancy*, not to "labor peace". T. at 120-25, 176-86. If "labor peace" is relevant here, then, it supports the Teachers' position, not Appellees'.

On the other hand, Appellees and the Amici stress the "injustice" of permitting the Teachers to reap "benefits" from the Union's representation, while remaining "free riders". U. at 32-35; N. at 37; X. at 45-46. As we have just shown, to what extent the Teachers *are* "free riders" when they "gain" Union representation only at the incalculable cost of losing

their own freedom of self-determination in employment, escapes us. But even leaving this problem aside, we can see no merit in the "free-rider" thesis for four reasons:

First, there is no rule of constitutional jurisprudence that either governments or private parties acting under color of state law can deprive dissenters of First- and Fourteenth-Amendment rights if they undertake to pay "compensation" for those abridgments. T. at 97-98. Instead, the essence of all this Court's teaching on the subject is that these rights are so precious, that their loss, "for even minimal periods of time, unquestionably constitutes *irreparable* injury". *Elrod v. Burns*, 96 S. Ct. 2673, 2690 (1976) (opinion of Brennan, J.) (emphasis supplied). First-Amendment rights, simply put, are beyond limitation on the basis of any "free-rider" theory. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943); *Marsh v. Alabama* 326 U.S. 501, 510 (1946) (Frankfurter, J., concurring).

Second, there is *no evidence* in the record linking representation by the Union, according to some scientifically demonstrable cause-and-effect relationship, to special benefits enjoyed by the Teachers. That such evidence cannot be brought forward, and that such a relationship cannot be established, we strongly believe. See, e.g., W.W. Brown & C.C. Stone, *An Empirical Analysis of the Impact of Collective Bargaining On Faculty Salary, Compensation, and Promotions in Higher Education* 23 (Ass'n of Cal. State Univ. Profs. 1976) (no demonstrable special benefit from public-sector bargaining by AFT, NEA, or NEA-AFT unions); Bradley, "Involuntary Participation in Unionism", in *Labor Unions and Public Policy* 47 (Am. Enterprise Inst. 1958) ("union-benefit" doctrine epistemologically unprovable); cf. P.D. Bradley, *Constitutional Limits to Union Power* (Council on Am. Affairs 1976). But in any event, Appellees and the Amici do not even bother to suggest how they might bring forward clear and convincing proofs of such a relationship between union representation and special benefits. Rather, they rely exclusively on the technique of *ipse dixit* to "establish" what

they themselves repeatedly imply are the constitutional facts the *demonstrated* (not merely imagined) existence of which is *absolutely vital* to their own case. *Ipse dixit*, however, is not enough where fundamental constitutional liberties are at stake. See T. at 117-19.

Third, the "benefit" argument begs the First-Amendment question in this case. The "benefit" compulsory unionism provides the Teachers through the PERA agency-shop is not, as Amici AFL-CIO and UAW suggest, a "neutral", "economic" service such as workmen's compensation or liability insurance. *Pace X.* at 40-43. Rather, it is precisely the "benefit" (whatever that may be to dissenters) of *participating indirectly in the associational activity known as unionism*. Collective bargaining through the exclusive-representation device is the embodiment, in statute form, of the ideology of trade unionism. *E.g. Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944). Therefore, to the extent that the Teachers have been required to acquiesce in the Union as their exclusive representative, and to suffer their terms and conditions of employment to be fixed through collective bargaining (rather than individual contract), their First- and Fourteenth-Amendment rights to self-determination in thought and association have been grievously abridged. The agency-shop is a further invasion of their liberties, an even more direct and unjustifiable ligature binding them to the Union through forced financial support of its *inherently associational* activities. Therefore, to the extent the Teachers receive this spurious "benefit", their freedom of association has been denied, *by hypothesis*. For the "benefit" is the constitutional violation! Obviously, then, the "benefit" cannot be proffered as the "justification" for denying the Teachers' First-Amendment rights. *The denial cannot logically justify itself.*

And not only logic, but also consequences, should induce this Court to reject out of hand the Amici's analogy of association with trade unions to patronage of insurance companies and other corporations. Surely the Amici must consider

Appellees' case desperate indeed to excogitate a comparison so far-fetched, and so at variance with everything economists, social scientists, historians, courts, *and especially unions themselves* have said about the labor movement from its inception. Who, besides the Amici here, has ever seriously argued that trade unions engage in activities not essentially and inherently different from those of business corporations generally? Indeed, the opposite presumption explains why courts have long protected the freedom to associate with unions under the First and Fourteenth Amendments. See T. at 35-38. But if, as the Amici claim, the "services" unions provide to members and (as here) force upon nonmembers are *constitutionally indistinguishable* from the transactions which corporations have with their customers, then it must follow that the freedom of corporations to provide various business services to consumers is a freedom protected by the First and Fourteenth Amendments. And if this is true, then every state regulation of corporate activity must be tested, not by the traditional "rational-basis" test, but by the strict "compelling-state-interest" and "least-restrictive-alternative" tests. Thus, to find for Appellees under the theory advanced by the Amici, this Court must (at least implicitly) overrule all of its prior decisions sustaining state regulation of corporate activity under the "rational-basis" test — as, for instance, *Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-67 (1973). But merely to state such a revolutionary consequence is to expose the defects of the Amici's argument.

Conversely, if this Court agrees with the Teachers in their analysis of *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), no such extreme result obtains. Unionism, *for voluntary members*, can remain within the special, strict preserve of First-Amendment constitutional jurisprudence; and state regulation of corporate activity can remain within the less-demanding domain of the "rational-basis" test. For if, as we suggest, *Hanson* merely permitted private-sector unions and employers to continue to exercise their traditional

common-law contractual privileges, then the congressional decision to override state "right-to-work" laws in the Railway Labor Act needed to satisfy *only* the "rational-basis" test, even where nonunion employees were concerned. Only if one mistakenly sees *Hanson* as involving a "state-action" problem of First-Amendment magnitude, but somehow not demanding application of the "compelling-state-interest" and "least-restrictive-alternative" tests, is it necessary to grope for the kind of jerry-built rationalization that the Amici advance, and the adoption of which must lead this Court deeper and deeper into a thicket of unresolvable constitutional contradictions and anomalies.

Fourth and last, the "benefit" argument also (and revealingly) neglects to deal with the question of how the agency-shop affects the *public* interest — ultimately, the interest which Appellees must demonstrate is served by compulsory unionism in Michigan. We have already outlined the many ways in which the agency-shop subverts the real public interests at stake in this case, as part of our anticipatory refutation of the argument that the agency-shop serves some compelling state interest. T. at 147-86. Appellees and their Amici, however, have chosen not to join issue on these matters.

We should add one final note. In our main brief, we pointed out that this Court has long recognized two separate tests in First-Amendment jurisprudence, the *per se* and the "balancing" tests. T. at 81-84. And we argued that, because the PERA agency-shop permits Appellees to control the *content* of the Teachers' speech and associations *as such*, it comes within that class of "direct" infringements which are, in literal constitutional terms, "abridgments" of First-Amendment rights — and, therefore, are unconstitutional on their face, no matter what governmental interests they may be argued to serve. T. at 85-99. Moreover, we demonstrated that, even if the agency-shop were viewed as merely an "indirect" impingement upon the Teachers' fundamental rights, and

therefore subject only to the "balancing test", none the less Appellees had not met (or even attempted to meet) the requirements of that test in the courts below. T. at 115-47.

Since our main brief was written, this Court has once again endorsed the analysis of First-Amendment problems which we employed. See *Elrod v. Burns*, 96 S. Ct. 2673, 2684-85 & n.17 (1976) (opinion of Brennan, J.), and especially its emphasis of the "speech"- "conduct" dichotomy explained in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), upon which decision the Teachers strongly rely. See T. at 81-82. *Accord*, *Buckley v. Valeo*, 96 S. Ct. 612, 633-34 (1976). Notwithstanding, Appellees remain eloquently silent on these matters. They make no attempt to show that the agency-shop is *not* a prior restraint upon the Teachers' First- and Fourteenth-Amendment rights — and, therefore, necessarily unconstitutional *per se* under this Court's precedents. See T. at 90-93. They make no attempt to show that the agency-shop is not a *direct* limitation of the Teachers' freedom of self-determination — and, therefore, necessarily unconstitutional *per se* as a matter of the logic of the Bill of Rights, as well as the authority of leading precedents. See T. at 94-99. And they make no attempt to satisfy the "balancing test", or even to show why the decision of the Michigan Court of Appeals has not precluded the possibility that they can satisfy that test. See T. at 127, 207-10.

In short, by their silence Appellees have conceded that, if any test more stringent than the "rational-basis" test rules this case, the Teachers must prevail. But since, as we demonstrated in Part I.A., *supra* p. 6, Appellees have also conceded that the PERA agency-shop *does* violate the Teachers' First-Amendment rights *and therefore cannot be judged simply by the "rational-basis" test*, it follows that Appellees have admitted that they can advance *no* rational case for the agency-shop.

C.

Appellees' analogy of agency-fees to "taxes" demonstrates how dangerously far Michigan has allowed the exclusive-representation device to intrude on governmental sovereignty, as well as on individual freedom.

What Appellees have done, however, is to provide further support (if any more were needed) for one part of the Teachers' public-interest argument — to wit, that reinforcing the exclusive-representation device with the agency-shop unnecessarily endangers governmental sovereignty. T. at 176-86. In our main brief we suggested that one of the long-term effects of the agency-shop would be to strengthen public-sector unions as rival claimants to sovereignty in the states of this nation. The Appellees have not criticized our observation; rather, their own arguments point up its cogency.

In their attempt to defend the agency-shop, Appellees claim that,

[w]hen Congress in the [National Labor Relations and Railway Labor Acts] adopted *employee self-government* in labor relations, and approved *pro-rata taxation for its costs*, it was replicating the principle long operative at every level of our governmental systems. A citizen, so long as he remains a member of the community must pay his share of its governance costs, local state and federal. His personal agreement with the expenditures of taxes is not a condition of his duty to pay.

U. at 21-22 (emphasis added). We need not explain at length that, when Congress *permitted* certain types of "union-security" agreements in private-sector employment, it certainly did not infuse private employers and unions with any authority to *tax* nonunion employees; Congress merely allowed those parties to continue to exercise a *common-law contractual privilege* they enjoyed long before it undertook to regulate labor relations. But when the State of Michigan enacted the PERA agency-shop, it delegated to public-sector

unions and employers a power theretofore unknown. See *Smigel v. Southgate Community School District*, 388 Mich. 531, 539-40, 202 N.W.2d 305, 306-07 (1972). In the public sector, then, Appellees are correct: the agency-shop does (as they say) "replicate" taxation.

But what profound constitutional issue this "replication" raises, Appellees do not say. We, however, shall. It raises the issue of whether a state government may constitutionally delegate a portion of its most fundamental sovereign power — the power to tax — to a private organization, under circumstances in which: (i) that delegation is unconfined by any meaningful standards; (ii) its exercise is unreviewed by any state authority; and (iii) its inevitable effect is to alienate the loyalties of those public-employee "taxpayers" from the government to the union. T. at 125-27. It raises the issue, in short, of whether a government under our constitutional system may "share" some portion of its sovereignty with private organizations bent upon the control of the system of public education in this country.

We have no doubt that, for public-sector unions such as the AFT and NEA, the agency-shop is merely the first step in a gradual, but inexorable process of eroding governmental — and therefore *popular* — control over our schools. We have said as much, and quoted authorities to that effect, in our main brief. T. at 161-64. And, of the parties before the Court, we are not alone in this view. In its Amicus brief, the NEA is careful to maintain silence with respect to the challenge which the agency-shop poses to governmental sovereignty; indeed, the *National League of Cities* and *Letter Carriers* cases receive no mention at all. But in its general propaganda, the NEA is more vocal. The *National League of Cities* decision, warns NEA President John Ryor,

strikes at the very core of the power of Congress to act on a federal collective bargaining bill for state and local government employees, including teachers and faculty.

We've got some things to say about this decision and our course for the future. And I hope those who would

destroy the rights of public employees are paying attention because they have a choice to make. They can work with us to establish those rights and opportunities that are basic to decency in the public sector — *or* they can continue to oppose us and we will establish those rights anyway, *no matter what it takes*.

* * * * *

The message I want the League of Cities and the other champions of the square wheel to hear and to understand is that* * * [w]e are not cowed by adversity. We are angered and strengthened by it.

NEA Advocate, Sept. 1976, at 7 (emphasis retained).

The lines of conflict are thus drawn — between public sector teacher-unions on one side, and government responsive to the people on the other, with nonunion public employees such as the Teachers caught helplessly in the middle. This appeal may be couched in terms of the First- and Fourteenth-Amendment rights of a few Detroit public-school teachers. But as the Framers of our Constitution so wisely foresaw, the defense of those freedoms will best defend as well the public interest of all citizens in a government responsive to, and controlled by, the people as a whole.

CONCLUSION

This Court should reverse the decision of the Michigan Court of Appeals, and grant the relief requested on pp. 214-16 of the Teachers' main brief.

Respectfully submitted,

SYLVESTER PETRO

2841 Fairmont Road

Winston-Salem, N.C. 27106

Attorney for Appellants

November 4, 1976

Of Counsel

JOHN L. KILCULLEN

Kilcullen, Smith & Heenan

1800 M Street, N.W., Suite 600

Washington, D.C. 20036

DENNIS B. DUBAY

Keller, Thoma, Toppin

& Schwarze, P.C.

1600 City National Bank Building

Detroit, Michigan 48226

RAYMOND J. LaJEUNESSE, JR.

National Right To Work Legal

Defense Foundation

8316 Arlington Boulevard, Suite 600

Fairfax, Virginia 22038

EDWIN VIEIRA, JR.

12408 Greenhill Drive

Silver Spring, Maryland 20904

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,

Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,

Appellees.

CHRISTINE WARCZAK, et al.,

Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,

Appellees.

On Appeal from the Court of Appeals of Michigan

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

RONALD A. ZUMBRUN,

JOHN H. FINDLEY,

Counsel, Pacific Legal Foundation,

455 Capitol Mall, Suite 465,

Sacramento, California 95814

SANDRA R. JOHNSON,

Associate Counsel, Pacific Legal Foundation,

455 Capitol Mall, Suite 465,

Sacramento, California 95814.

Attorneys for Amicus Curiae

Pacific Legal Foundation.

Subject Index

| | Page |
|--|------|
| Opinion below | 1 |
| Interest of Amicus | 2 |
| Introduction | 3 |
| Argument | 4 |
| The Michigan statute authorizing state agencies to compel public employees to pay a service fee which is the equivalent of union dues as a condition of employment violates the right of association of employees who do not desire to support the union | 4 |
| A. Freedom from compelled association | 4 |
| B. The distinction between union dues required as a condition of public employment and those required as a condition of private employment | 7 |
| Conclusion | 17 |

Table of Authorities Cited

| Cases | Pages |
|--|--------------|
| Board of Regents v. Roth, 408 U.S. 564 (1972) | 8 |
| Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973) | 8 |
| Broadrick v. Oklahoma, 413 U.S. 601 (1973) | 13 |
| Buckley v. Valeo, U.S., 46 L. Ed. 2d 659 (1976) .. | 4 |
| DeGregory v. Attorney General of the State of New Hampshire, 383 U.S. 825 (1966) | 12, 13 |
| Dunn v. Blumstein, 405 U.S. 330 (1972) | 15 |
| Illinois State Employees Union, Council 34, etc. v. Lewis, 473 F.2d 561 (7th Cir. 1972), cert. denied, 410 U.S. 928 (1973) | 8 |
| International Association of Machinists v. Street, 367 U.S. 740 (1961) | 8, 9, 15, 16 |
| Konigsberg v. State Bar of California, 366 U.S. 36 (1962) | 11, 13 |
| Kusper v. Pontikes, 414 U.S. 51 (1973) | 5 |
| McNamara v. Johnston, 360 F.Supp. 517 (N.D. Ill. 1973) | 9 |
| Mills v. Alabama, 384 U.S. 214 (1966) | 11, 16 |
| NAACP v. Alabama, 357 U.S. 449 (1958) | 4 |
| NLRB v. General Motors Corp., 373 U.S. 734 (1963) | 4 |
| Perry v. Sindermann, 408 U.S. 593 (1972) | 8 |
| Pickering v. Board of Education, 391 U.S. 563 (1968) | 6, 7 |
| San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) | 15 |
| Shelton v. Tucker, 364 U.S. 479 (1960) | 14, 15, 16 |
| Thomas v. Collins, 323 U.S. 516 (1945) | 12, 13 |
| West Virginia State Board of Education v. Barnette, 319 U.S. 643 (1943) | 8 |

TABLE OF AUTHORITIES CITED

iii

Codes

| | Pages |
|-----------------------------|-------|
| California Government Code: | |
| Sections 3540, et seq. | 3 |

Constitutions

| | |
|-----------------------------|---------------------------|
| United States Constitution: | |
| First Amendment | 2, 4, 5, 8, 9, 11, 12, 13 |
| Fifth Amendment | 2 |
| Fourteenth Amendment | 2, 4, 5 |

Rules

| | |
|----------------------|---|
| Supreme Court Rules: | |
| Rule 42 | 3 |

Statutes

| | |
|---|--------------------------------------|
| Michigan Public Employment Relations Act: | |
| Section 10 | 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16 |
| Mich. Stat. Ann. § 17.455 (10), Mich. Comp. Laws: | |
| Section 423.210 | 2, 3 |
| 29 U.S.C.: | |
| Section 158 | 3 |
| 45 U.S.C.: | |
| Sections 151, et seq. | 7 |

Texts

| | |
|--|----|
| Blair, Union Security Agreements in Public Employment, 60 Cornell L. R. 183 (1975) | 10 |
|--|----|

In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1975

No. 75-1153

D. LOUIS ABOOD, et al.,
Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

CHRISTINE WARCZAK, et al.,
Appellants,

vs.

DETROIT BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Court of Appeals of Michigan

**BRIEF OF PACIFIC LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS**

OPINION BELOW

The Michigan Court of Appeals in an opinion reported at 60 Mich. App. 92, 230 N.W.2d 322 (1975),

held that Mich. Stat. Ann. § 17.455(10), Mich. Comp. Laws § 423.210, which allows negotiation of agency shop provisions in public employer-employee collective bargaining contracts, does not violate the First or Fifth Amendment rights of workers insofar as they are forced to support collective bargaining activities of the union. However, it indicated that forced financial support of union activities for purposes other than collective bargaining could violate the First and Fourteenth Amendment rights of public employees.

INTEREST OF AMICUS

Pacific Legal Foundation (hereinafter PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens. Twelve of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of a brief *amicus curiae* in support of petition for writ of certiorari in this case.

PLF considers this case to be of special significance in that it presents this Court with questions regarding the constitutional rights of the rapidly increasing number of our nation's citizens who have chosen a career in public service. Numerous state legislatures,

including that of California, have recently passed statutes regarding the organizational rights of these workers, similar to the Michigan law which is challenged in this proceeding. California Government Code §§ 3540, *et seq.* PLF believes it is in the general interest that these laws be construed and limited by this Court to protect the rights of association and expression of *all* public employees.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consents have been filed with the Clerk of the Court.

INTRODUCTION

Section 10 of the Michigan Public Employment Relations Act (hereinafter PERA) permits a public employer to make "an agreement with an exclusive bargaining representative [of the employees] . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." Mich. Stat. Ann. § 17.455(10), Mich. Comp. Laws § 423.210. This statutory authorization of an "agency shop" does not allow the exclusive bargaining representative, the union, to require union membership. However, this Court has ruled in cases construing a portion of The National Labor Relations Act, 29 U.S.C. § 158, that the agency shop is the functional equivalent of the union shop which requires union

membership as a condition of employment. This is so because all that can be lawfully required under a union shop security agreement is the payment of dues to the union by the employees and this payment of fees is exactly what is required in agency shop agreements. *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). Further, employees working under a contract which requires payment of union dues, but not union membership, are nonetheless indirectly compelled to join the union since only active membership can assure them a voice in the organization in which their money is spent.

ARGUMENT

THE MICHIGAN STATUTE AUTHORIZING STATE AGENCIES TO COMPEL PUBLIC EMPLOYEES TO PAY A SERVICE FEE WHICH IS THE EQUIVALENT OF UNION DUES AS A CONDITION OF EMPLOYMENT VIOLATES THE RIGHT OF ASSOCIATION OF EMPLOYEES WHO DO NOT DESIRE TO SUPPORT THE UNION.

A. Freedom from compelled association

This Court has long recognized the freedom of association as part of the fundamental right of expression guaranteed by the First and Fourteenth Amendments of the Constitution. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). This freedom includes the right to lend financial support to an organization. *Buckley v. Valeo*, _____ U.S. _____, 46 L. Ed. 2d 659 (1976). Just as the rights to express oneself and to associate are protected by the Constitution, so is the freedom from compelled expression and the right not to associate.

This was recognized by this Court in *Kusper v. Pontikes*, 414 U.S. 51 (1973), which held unconstitutional an Illinois law which prohibited a person from voting in a primary election of a political party if he had voted in the primary of another party during the preceding 23 months. In *Pontikes*, *supra* at 57, this Court found that one of the significant evils of the statute was to “‘lock’ the voter into his preexisting party affiliation,” thus compelling an association he did not desire.

As an indispensable basis for freedom of association, the First Amendment, applicable to the states through the Fourteenth Amendment, guarantees “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” United States Constitution, Amendment 1. Yet, Section 10 of PERA authorizes the public employer to make an agreement with the union as exclusive bargaining agent to require, as a condition of employment, the payment of a service fee equivalent to the amount of union dues. The recognition of an exclusive bargaining agent deprives nonunion members of their right to petition the government for redress of grievances—only the exclusive bargaining agent, which is in no way responsive to the control of nonunion members, can deal with the government employer.

PERA adds insult to injury in first stripping the nonunion teacher of his right to petition the government employer and then requiring him to finance this deprivation of his freedom to speak, associate,

and petition. If the teacher refuses to pay, his employment is terminated. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court addressed the question whether a teacher could be fired for speaking out on school administration. This Court there said:

"To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Id.* at 568 (citations omitted).

Pickering concerned freedom to raise the issue of the obtaining and use of public school funds, a subject which under PERA may only be addressed by the union selected as exclusive bargaining agent. Yet this Court declared in *Pickering*:

"More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak

out freely on such questions without fear of retaliatory dismissal." *Id.* at 571-572.

The present case presents a turn for the worse from the *Pickering* facts. Not only are the nonunion teachers forbidden from contributing to the decision making process of their employers their "informed and definite opinions as to how funds allotted to the operation of the schools should be spent," they are forced to expend their own resources to finance the very instrument which muzzles them.

B. The distinction between union dues required as a condition of public employment and those required as a condition of private employment

In *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956), this Court upheld the Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*, which permitted a "union shop" security agreement in collective bargaining contracts between railroads and their employees. *Hanson* dealt only with private employment and explicitly did no more than to uphold government authorization of compelled payment of union dues.

The situation presented to the Court by the Railway Labor Act in *Hanson* can be distinguished in numerous respects from the present case involving the Michigan Public Employment Relations Act. Perhaps the most striking difference is that the Railway Labor Act merely allowed private parties to negotiate a contract which mandated a union shop. PERA allows the state government itself to compel payment of fees to a union by entering into a collective bargaining contract which includes an agency shop clause.

This compulsion by the state is what lower courts have abhorred. In *Bond v. County of Delaware*, 368 F. Supp. 618 (E.D. Pa. 1973), a district court declared that state action requiring a public employee to financially support the Republican Party would be a denial of his right of association. In *Illinois State Employees Union, Council 34, Etc. v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied* 410 U.S. 928 (1973), the Seventh Circuit Court of Appeals held that a state employee could not be discharged because he refused to join or support the Republican Party. Again in *West Virginia State Board of Education v. Barnette*, 319 U.S. 643 (1943), this Court held that state compulsion of the flag salute violated an individual's First Amendment freedom of expression.

Since this Court's holdings in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), it has been decided that a state may not deny public employment for reasons which violate a worker's constitutional rights. When a state agency, pursuant to PERA, negotiates a contract which compels union support by public employees, such a violation occurs.

Railway Employees' Department v. Hanson, *supra* at 235 and 238, upheld only compulsory assessment of fees for collective bargaining costs in private industry. It did not decide whether use of these fees for political purposes would violate the First Amendment rights of employees who joined the union only to keep their jobs. This was clearly recognized by this Court in *International Association of Machinists v.*

Street, 367 U.S. 740, 746-750 (1961), which raised but did not decide this constitutional issue.

While *Street* avoided the constitutional question by statutory construction, the case has clear constitutional overtones. *McNamara v. Johnston*, 360 F.Supp. 517 (N.D. Ill. 1973). In *Street*, both Justice Douglas (concurring at 775-779) and Justice Black (dissenting at 780-791) agreed that the First Amendment would indeed be violated if the union used funds received from coerced employees to support political purposes they opposed.

"Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands." (Black, J., dissenting at 788.)

Application of this view to the situation of a public employee, who, under PERA, must pay union dues to keep his job, clearly indicates a First Amendment violation since collective bargaining in public employment is by nature a political process.

Collective bargaining works in the private sector because of the demands of competition on the employer. The competitive factor inhibits the private employer from yielding to those demands of the union which by reason of their cost factor will price his product out of the competitive market. Balancing

this restraint, however, is the knowledge that if the employer resists reasonable demands by the union, a strike will probably be called and the loss of his labor force will then place the employer in a situation in which he cannot profitably compete. These countervailing forces generally require the employer and the union to strike a rough equilibrium grounded on economic pragmatism.

The factor of economic competition is almost entirely absent in the public sector. In public employment, the union must bargain with representatives of the government. The success of the union often will depend not solely on economic factors, but on political decisions regarding budget approval and tax allocations made by other legislative and executive officials quite apart from the bargaining process. *See Blair, Union Security Agreements in Public Employment*, 60 Cornell L. R. 183 (1975).

Hence, to assure a favorable position at the bargaining table, it may well be necessary for the union to engage in intense political activity such as lobbying and support of candidates before bargaining is begun. This type of activity may ultimately affect the bargaining process, but also reaches far beyond this confined area. Political candidates and positions which the union may deem favorable to it in the area of employee relations may also represent views which coerced employees find objectionable in numerous other areas.

In compelling union support, state officials who negotiate an agency shop contract pursuant to PERA

are clearly directly compelling political associations of dissenting employees by way of financial assistance for a range of activities far beyond those necessary for traditional collective bargaining in private employment.

Less directly, but no less meaningfully, when the public employee is asked to contribute to the political coffers of the union, he is being deprived of funds with which he could make his voice heard in causes of his own choosing. Further, in being asked financially to support causes to which he may be diametrically opposed, he is not being asked merely to keep his own views to himself, but to strengthen opposition which may work to defeat the causes he espouses. These barriers to political expression which PERA puts in the way of dissenting employees are particularly onerous in light of the view of this Court that the major purpose of the First Amendment is to protect freedoms in the political area. *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966).

It is recognized that even the fundamental rights of association and expression are not absolute and when these constitutional guarantees are asserted against the exercise of governmental powers, it is necessary for the courts to engage in a "balancing" process. This involves an "approximate weighing" of the rights of individuals whose liberties are threatened against the interests which the state asserts are served by the deprivation of rights. *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 (1962).

However, this Court has ruled that when the state attempts to interfere with the fundamental First Amendment liberties, it must show a compelling state interest for such interference. A mere rational connection between the state action and the interest it seeks to serve or the evil it wishes to curb by the restriction of fundamental rights is not enough. *Thomas v. Collins*, 323 U.S. 516 (1945); *DeGregory v. Attorney General of the State of New Hampshire*, 383 U.S. 825 (1966). Thus during the "balancing" process, the scales are, at the onset, weighted heavily in favor of upholding the rights of the individual and against the restrictive action of the state. Further, as this Court has ruled in *Thomas v. Collins*, *supra* at 530, "[I]t is the character of the right, not the limitation, which determines . . . the choice" of the compelling state interest standard. Therefore, even a small intrusion into individual liberties must be justified by a compelling state interest.

This Court in *Railway Employees' Department v. Hanson* decided that, on the facts of that case, no valid First Amendment claims were presented. Therefore, it did not engage in the balancing test and decided that the union shop challenged therein served a legitimate objective and was rationally related to serving the state interest of facilitating interstate commerce. *Id.* at 233.

However, the differences between the state's role under PERA and the political nature of collective bargaining in the public sector give the appellants' First Amendment claims strength in areas in which

this Court could have found the private employees' claim deficient. Therefore, this Court must conduct the balancing dictated by *Konigsberg v. State Bar of California*, *supra*, and require that appellees prove a "compelling state interest" as required in *Thomas v. Collins*, *supra*, and *DeGregory v. Attorney General of the State of New Hampshire*, *supra*.

It is clear that even a slight infringement of fundamental rights such as those of association will trigger the need for a compelling state interest to justify it. *Thomas v. Collins*, *supra*. However, in the case at bar the infringement of the freedom of association caused by the state compulsion of employees to support the union inherent in PERA is not slight.

As discussed, *supra*, compelled support of public employee collective bargaining involves compelled support of an entire political program, thus striking at the very core of the purpose of the First Amendment. Further, public employees in all states already have their political activities somewhat restricted by "little Hatch Acts." These acts are cited in footnote 2 in *Broadrick v. Oklahoma*, 413 U.S. 601, 604 (1973), in which this Court upheld the constitutionality of such acts.

The additional burden of forced contribution to a union which may be used to further objectionable candidates and positions goes a great distance in completely silencing the political voice of the public employee. While these "little Hatch Acts" prevent him from becoming as active as he may wish on behalf of candidates he supports, compelled contri-

bution to a union supporting opposing positions deprives him of financial resources to further his beliefs, while increasing the strength of the opposition by these same financial contributions.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court singled out teachers, the appellants in the case at bar, as a group whose associational rights must be particularly protected:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with the freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. . . .'" *Id.* at 487 (citation omitted).

Thus this Court has recognized the greater weight which must be given to the individual rights of at least one segment of the public employment sector. This, of course, is necessary if all freedoms are to be bolstered by an effective system of public education.

Against these very important individual interests asserted by appellants, the Court must balance the compelling state interest asserted by appellees in support of the infringement of the individual's rights.

It is clearly the duty of those supporting the restriction to convince this Court that a compelling state interest exists. *Dunn v. Blumstein*, 405 U.S. 330, 342-343 (1972). However, compelling state interests may well be served by a finding that compulsory support of public employee unions is unconstitutional.

It is of vital importance that public employees, teachers in particular, have the fullest possible freedom to explore all avenues of thought and association in order to serve the optimal educational function. While this Court has not held that public education itself is a constitutional right, it has recognized the grave significance of education to our democratic society. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 30 (1973). It follows without question that compelling state interests are served by allowing teachers all possible opportunities to increase their effectiveness. These opportunities can only be hindered by compelling certain forms of association and preventing others that are lawfully acceptable.

The compelling state interest test examined in *Dunn v. Blumstein*, *supra*, however, cannot be met merely because those seeking to support a restriction on constitutional freedoms can demonstrate that an important state interest is served by the restrictive action. It must also be shown that the state has used the least drastic method of infringing upon individual liberties to serve this interest. *Shelton v. Tucker*, *supra* at 488.

Justice Douglas, concurring in *International Association of Machinists v. Street*, *supra* at 776, elo-

quently reaffirmed this requirement when speaking of compelled union association in the private employment sector:

"Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth and Fifth Amendments be lost and we all succumb to regimentation. . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. He should be allowed to enter the group with his own flag flying . . . nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent . . . and he should not be required to finance the promotion of causes with which he disagrees."

As it now reads, PERA does not meet the requirements of this Court in *Shelton v. Tucker, supra*, or those of Justice Douglas in *Street, supra*. It allows payment to the union of "a service fee equivalent to the amount of dues uniformly required of members. . . ." PERA § 10. No distinction is made between payment for support of collective bargaining and that for support of union activities beyond this sphere. In order not to offend the political freedoms which this Court has recognized as being of primary importance in *Mills v. Alabama, supra*, and as the Michigan Court of Appeals recognized below, the statute also would be defective to the extent it permits compulsion of payment for other than very narrowly defined union activities in the sphere of employment contract negotiation and administration.

CONCLUSION

For the reasons stated above, the decision of the Michigan Court of Appeals should be reversed insofar as it authorizes involuntary payments of agency shop service fees by nonunion public employees.

Respectfully submitted,

RONALD A. ZUMBRUN,

JOHN H. FINDLEY,

Counsel, Pacific Legal Foundation,

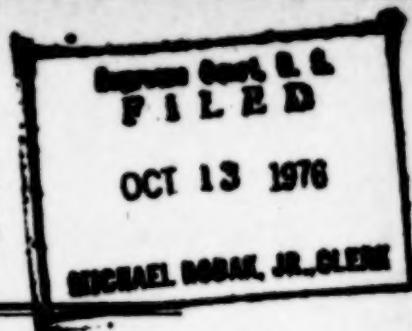
SANDRA R. JOHNSON,

Associate Counsel, Pacific Legal Foundation,

*Attorneys for Amicus Curiae
Pacific Legal Foundation.*

Dated, July, 1976.

No. 75-1153



IN THE
Supreme Court of the United States
October Term, 1976

D. LOUIS ABOOD, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

CHRISTINE WARCZAK, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

**BRIEF FOR THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AND FOR THE INTERNATIONAL
UNION, UAW AS AMICI CURIAE**

STEPHEN I. SCHLOSSBERG
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

JOHN A. FILLION
8000 East Jefferson Ave.
Detroit, Mich. 48214
Attorneys for UAW

J. ALBERT WOLL
ROBERT C. MAYER
815 Fifteenth Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for AFL-CIO



INDEX

| | Page |
|--|------|
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 7 |
| I. Introduction—The Issue | 7 |
| II. This Court, in <i>Railway Employees Dept. v. Han-</i> <i>son</i> , 351 U.S. 225, and <i>Lathrop v. Donohue</i> , 367 U.S. 820, Has Already Determined the Only Is- sue in This Case | 19 |
| A. Lathrop's rationale governs this case | 22 |
| B. Appellants' efforts to distinguish Lathrop are unavailing | 26 |
| C. Lathrop disproves Appellants' theory that all activities of public employee unions are political activities | 28 |
| III. The Agency Shop Clause Serves the Function of Spreading the Non-political Costs of the Exclu- sive Representative Among All Employees Bene- fitted; This Purpose is One Pursued by Govern- ment in Many Areas and Infringes No First Amendment Values Whatever | 31 |
| A. The theory of the Michigan PERA | 32 |
| B. Requiring all those represented by a bargain- ing representative to contribute to defray the agent's non-political costs is an economic regulation that does not infringe upon First Amendment values | 40 |
| IV. Appellants Misuse the Decisions of This Court .. | 57 |
| CONCLUSION | 66 |

CITATIONS

CASES:

| | Page |
|--|-----------|
| <i>Adair v. United States</i> , 208 U.S. 161 | 28 |
| <i>Adams v. United States ex. rel. McCann</i> , 317 U.S. 269 | 55 |
| <i>A. L. A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 | 6, 62, 64 |
| <i>American Steel Foundries v. Tri-City Central Trades Council</i> , 275 U.S. 184 | 66 |
| <i>Arrington v. Taylor</i> , 380 F.Supp. 1348, aff'd <i>per curiam</i> 526 F.2d 587, cert. denied 424 U.S. 913 | 56, 57 |
| <i>Associated Press v. NLRB</i> , 301 U.S. 103 | 44 |
| <i>Associated Press v. United States</i> , 326 U.S. 1 | 44 |
| <i>Bell v. Burson</i> , 402 U.S. 535 | 52 |
| <i>Broadrick v. Oklahoma</i> , 413 U.S. 601 | 15 |
| <i>Buckley v. American Federation of Television and Radio Artists</i> , 496 F.2d 305, cert. denied 419 U.S. 1093 | 60 |
| <i>Buckley v. Valeo</i> , 424 U.S. 1 | 44, 53 |
| <i>Carter v. Carter Coal Co.</i> , 298 U.S. 238 | 6, 62, 63 |
| <i>City of Charlotte v. Local 660, Firefighters</i> , — U.S. —, 44 U.S.L.Wk. 4801 | 45 |
| <i>City of Madison v. WERC</i> , No. 75-946 | 43, 45 |
| <i>Continental Baking Co. v. Woodring</i> , 286 U.S. 352 | 43, 53 |
| <i>Coppage v. Kansas</i> , 236 U.S. 1 | 6, 65 |
| <i>Cox v. New Hampshire</i> , 312 U.S. 568 | 17 |
| <i>Curriu v. Wallace</i> , 306 U.S. 1 | 63 |
| <i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 922 | 16 |
| <i>Dreyer v. Illinois</i> , 187, U.S. 71 | 63 |
| <i>Emporium Capwell Co. v. Community Org.</i> , 420 U.S. 50 | 38, 39 |
| <i>Ex Parte Poresky</i> , 290 U.S. 30 | 43 |
| <i>Faretta v. California</i> , 442 U.S. 806 | 55 |
| <i>Giboney v. Empire Storage and Ice Co.</i> , 336 U.S. 490.... | 44 |

| | Page |
|---|---------------------------------|
| <i>Grosjean v. American Press Co.</i> , 397 U.S. 233 | 44 |
| <i>Hammond v. United Papermakers and Paperworkers Union, AFL-CIO</i> , 462 F.2d 174, cert. denied 409 U.S. 1028 | 60 |
| <i>Hanover Township Federation of Teachers v. Hanover Community School Corp.</i> , 457 F.2d 436 | 45 |
| <i>Healy v. James</i> , 408 U.S. 169 | 56 |
| <i>Hendrick v. Maryland</i> , 235 U.S. 610 | 53 |
| <i>Hines v. Anchor Motor Freight</i> , 424 U.S. 554 | 39 |
| <i>Hudgens v. NLRB</i> , 424 U.S. 507 | 20 |
| <i>Indianapolis Education Assn. v. Lewallen</i> , 72 LRRM 2071 | 45 |
| <i>J. I. Case Co. v. Labor Board</i> , 321 U.S. 332 | 38 |
| <i>Kewananakoa v. Polyblank</i> , 205 U.S. 349 | 61 |
| <i>Labor Board v. General Motors Corp.</i> , 373 U.S. 734 | 59 |
| <i>Lathrop v. Donahue</i> , 367 U.S. 820 | passim |
| <i>Law Students Research Council v. Wadmond</i> , 401 U.S. 154 | 2, 12 |
| <i>Lincoln Federated Labor Union v. Northwestern Iron & Metal Company, et. al.</i> , 335 U.S. 525 | 6, 66 |
| <i>Linscott v. Miller Falls Company</i> , 440 F.2d 14, cert. denied, 404 U.S. 872 | 59 |
| <i>Lowe v. Hotel & Restaurant Employees Union</i> , 289 Mich. 123, 205 N.W.2d 167 | 40 |
| <i>Machinists v. Street</i> , 367 U.S. 740 | 3, 7, 8, 10, 12, 17, 20, 25, 33 |
| <i>McAuliffe v. Mayor of New Bedford</i> , 155 Mass. 216, 29 N.E. 517 | 61 |
| <i>McGrail v. Detroit Federation of Teachers</i> , 82 LRRM 2623, aff'd Mich. Ct. of App. No. 16493 (1974) | 40 |
| <i>Medo Photo Supply Corp. v. Labor Board</i> , 321 U.S. 678 | 38 |

| | Page |
|---|--|
| <i>NLRB v. Allis-Chalmers Mfg. Co.</i> , 338 U.S. 175 | 39 |
| <i>Oil, Chemical & Atomic Workers, etc. v. Mobil Oil</i> , U.S., 44 U.S. L. Wk. 4842 | 34 |
| <i>Oklahoma Press Publishing Co. v. Walling</i> , 327 U.S. 186 | 44 |
| <i>Order of Railroad Telegraphers v. Railway Express Agency, Inc.</i> , 321 U.S. 342 | 38 |
| <i>Patton v. United States</i> , 281 U.S. 276 | 55 |
| <i>Pipefitters v. United States</i> , 407 U.S. 385 | 8 |
| <i>Railway Clerks v. Allen</i> , 373 U.S. 114 | 3, 13, 17, 18, 33 |
| <i>Railway Employes Dept. v. Hanson</i> , 351 U.S. 225 | 3, 5, 6, 7, 8, 10, 12, 13, 14, 19, 20, 21, 28, 31, 33, 34, 57, 62 |
| <i>Reid v. McDonnell Douglas Corp.</i> , 443 F.2d 408 | 19, 20 |
| <i>Retail Clerks v. Schermerhorn</i> , 375 U.S. 96 | 20 |
| <i>Rockwell v. Crestwood School District Board of Edu- cation</i> , 393 Mich. 611, appeal dismissed | U.S., 44 U.S. L. Wk. 3747 |
| <i>Schlesinger v. Ballard</i> , 419 U.S. 498 | 41, 42 |
| <i>Shuttlesworth v. Birmingham</i> , 394 U.S. 147 | 16, 17 |
| <i>Singer v. United States</i> , 380 U.S. 24 | 55 |
| <i>Speiser v. Randall</i> , 357 U.S. 513 | 6, 61, 62 |
| <i>Steele v. Louisville and Nashville R. Co.</i> , 323 U.S. 192 .. | 39 |
| <i>Thomas v. Collins</i> , 323 U.S. 516 | 44 |
| <i>United States v. CIO</i> , 335 U.S. 106 | 7 |
| <i>United States v. O'Brien</i> , 391 U.S. 367 | 44 |
| <i>United States v. U.A.W.</i> , 352 U.S. 567 | 7 |
| <i>Uphaus v. Wyman</i> , 360 U.S. 72 | 63 |
| <i>Usery v. Turner Elkhorn Mining Co.</i> , U.S., U.S.L.Wk. 5181 | 5, 41, 42, 43, 45 |
| <i>Veed v. Schwartzkopf</i> , 353 F.Supp. 149, aff'd 478 F.2d 1407, cert. denied 414 U.S. 1135 | 56, 57 |
| <i>Virginia State Board of Pharmacy v. Virginia Citizens</i> | |

| | Page |
|---|------|
| <i>Consumer Council, Inc.</i> , U.S., 44 U.S. L. Wk. 4686 | 44 |
| <i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 | 54 |
| <i>Yott v. North America Rockwell Corp.</i> , 501 F.2d 398 | 60 |

STATUTES:

| | |
|---|---------------------------------------|
| Act of June 29, 1956, c. 462, Title II, 70 Stat. 397, as amended | 53 |
| Michigan Public Employees Relations Act, MCLA 423.201 et seq. | 4, 10, 11, 15, 32, 40, 49, 59, 60, 62 |
| § 423.210(1) | 32, 36 |
| § 423.210(1)(c) | 33 |
| § 423.210(1)(e) | 36 |
| § 423.210(2) | 27, 34 |
| § 423.211 | 36 |
| § 423.212 | 23 |
| § 423.214 | 23 |
| National Labor Relations Act as amended, 29 U.S.C. § 151 et seq. | 4, 21, 32, 33, 40, 59 |
| § 7, 29 U.S.C. § 157 | 35 |
| § 8(a), 29 U.S.C. § 158(a) | 36 |
| § 8(a)(3), 29 U.S.C. § 158(a)(3) | 32, 34, 59 |
| § 8(a)(5), 29 U.S.C. § 158(a)(5) | 36 |
| § 9(2), 29 U.S.C. § 159(a) | 36, 37 |
| § 14(6), 29 U.S.C. § 164(6) | 20 |
| Railway Labor Act as amended, 45 U.S.C. § 151 et seq. | 4, 20, 32, 33, 38, 40 |
| § 2, Second, 45 U.S.C. § 152, Second | 39 |
| § 2, Fourth, 45 U.S.C. § 152, Fourth | 33, 35 |
| § 2, Eleventh, 45 U.S.C. § 152, Eleventh | 20, 33, 34 |

| | Page |
|-----------------------|------|
| 18 U.S.C. § 610 | 8 |
| 23 U.S.C. § 120 | 53 |
| 23 U.S.C. § 126 | 53 |

MISCELLANEOUS:

Legislative Material:

| | |
|---|----|
| S. Rep. No. 537 on S. 1958, 74th Cong., 1st Sess. (1935) | 38 |
|---|----|

Other:

| | |
|--|------------|
| R. Haveman, The Economics of the Public Sector (1970) | 46 |
| Hobbes, Leviathan | 61 |
| R. Musgrave, The Theory of Public Finance (1959) | 48 |
| M. Olson, The Logic of Collective Action (1967) .. | 48, 49, 51 |
| W. Shakespeare, King Henry VI, Part II | 28 |

IN THE
Supreme Court of the United States

October Term, 1976

No. 75-1153

D. LOUIS ABOOD, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

CHRISTINE WARCZAK, *et al.*,
Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

**BRIEF FOR THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AND FOR THE INTERNATIONAL
UNION, UAW AS AMICI CURIAE**

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 109 national and international labor unions having a total membership of approximately

14,000,000 men and women, and by the International Union UAW, an independent industrial union of 1,400,000 members, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

SUMMARY OF ARGUMENT

1. Appellants maintain that "[t]his Court must * * * assume in passing upon the constitutionality of § 10 [of the Michigan Public Employees Relations Act ("PERA")] that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities." (Br. for Appellants, 19.) In Part I(A) of this brief, we demonstrate that this assumption is in error. The Michigan Court of Appeals declared that public employees who are covered by an agency fee provision may not be required to fund political activities of the union, and that any such employee who files a proper protest is therefore entitled to a rebate of the "portion of his money expended by the union * * * for causes and candidates to which he objects." (App. 104.) Thus, the agency shop clause in question and the statute authorizing it are valid in Michigan only on the condition that any properly objecting employees may obtain a reimbursement for political expenditures; that holding is of course binding here, since no cross-appeal has been taken. (See, e.g., *Law Students Research Council v. Wadmond*, 401 U.S. 154, 157-158, n. 8, 164, n. 18.)

Therefore, contrary to appellants, the only issue on the merits on this appeal is whether the government may require an employee, as a condition of his employment, to pay a fee to defray the non-political expenditures of the union

selected by the majority of his fellow employees in an appropriate unit as the exclusive bargaining representative of all employees in the unit.

Appellants also insist that on the view taken by the Michigan Court of Appeals of the political expenditures question, that court was obliged to enjoin in its entirety the application of the agency shop clause to them. But that injunctive remedy is the one that plaintiffs in *Machinists v. Street*, 367 U.S. 740, and *Railway Clerks v. Allen*, 373 U.S. 114, had sought and obtained in the state courts and which this Court, reversing those decisions, expressly held was "impermissible." These holdings were not, as appellants contend, merely statutory interpretations; *Street* and *Allen* held that an employee has no constitutional right to be relieved of the obligation of paying dues to a union merely because the union expends money for political purposes, rejecting the identical claim under the First and Fourteenth Amendments which appellants assert here.

2. It is our view that *Railway Employees Dept. v. Hanson*, 351 U.S. 225, is dispositive of the issues in this case. Appellants contend that *Hanson* is not determinative because it was a "preemption" case (Br. for Appellants, 194). In Part II, we first note the reasons that this contention is in error. We then turn to a discussion of *Lathrop v. Donohue*, 367 U.S. 820, which appellants do not dispute was a case which *did* involve a direct state rule requiring payment of fees to an organization—there, the state bar association.

In *Lathrop*, six members of the Court agreed that a state:

"in order to further the State's legitimate interests in raising the quality of professional services, may consti-

tutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (367 U.S., at 843. See also, accepting this aspect of the plurality opinion's analysis, *id.*, at 850 (Harlan and Frankfurter, JJ., concurring)).

The agency shop clause at issue in this case is in all pertinent respects indistinguishable from the requirement approved in *Lathrop*. First, the requirement imposed here and in *Lathrop* is identical: to provide financial support, but not any other form of support, to an association of others similarly employed. Second, the consequences of non-compliance here and in *Lathrop* are identical: the individual may lose his present means of support. Third, the state interest served by the requirement here and in *Lathrop* is quite similar—to spread among all the members of a group engaged in certain employment the costs of programs relating to that employment and thought to benefit both the public generally and, in particular, the persons so employed. Indeed, as we demonstrate, the agency shop here is in several ways less restrictive than the integrated bar approved in *Lathrop*.

Finally, we show in Part II that appellants' attempts to distinguish *Lathrop* are unavailing, and that *Lathrop* also disposes of the contention that all the activities of the defendant union are "political."

3. In Part III, we proceed on the assumption that this case is *res nova* and explain the interests served by the Michigan statute authorizing agency shop clauses for public employees. From our analysis, it becomes clear that the

Michigan PERA, like the federal statutes upon which it is modeled—the RLA and the NLRA—encompasses a *set* of interrelated policy determinations with respect to labor relations. These include the fundamental decision that employee wages, hours and working conditions are to be determined by collective bargaining when a majority of the employees choose representation for that purpose; the assignment of certain functions and responsibilities to the chosen representative, including the exclusive representative's duty of fairness to all the represented employees; and the legislative decision that the costs of maintaining the activities of the representative which the employees have chosen may be spread among all the employees upon whose behalf the union does, and is required to, engage in collective bargaining and the pursuit of grievances.

We next show that the ruling of the court below is fully consonant with more general legal and economic principles governing the situations in which government may exact fees from a group of people for certain purposes without infringing upon constitutional rights. "It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality * * *." (*Usery v. Turner Elkhorn Mining Co.*, — U.S. —, 44 U.S.L.Wk. 5181, 5186.) The basic governing proposition in *Hanson* and this case is that the presumption of constitutionality as to legislation designed to adjust economic costs and benefits in an equitable manner is not lost merely because this is done by enforcing payments to an organization which has particular statutory responsibilities to a group broader than its own membership. This is so especially where those responsibilities involve activities in which individuals do not have any

constitutional right to engage on their own behalf—such as collective bargaining—and where the organization is democratically selected by a majority of those who will be affected by its activities.

4. Just as appellants' efforts to escape the authority of *Hanson* and its progeny and *Lathrop* is based on incorrect readings of those decisions, appellants likewise misunderstand the decisions of this Court which they cite in their favor. In Part IV, we address ourselves first to a facet of appellants' argumentative technique which is inimical to rational discourse: their willingness to assert, at different points of their brief, opposite sides of the same proposition. For example, appellants expound a theory of governmental absolutism which would, if accepted, require rejection of their own claim for relief against the defendant Board of Education.

We then discuss certain of the precedents appellants rely upon—in particular, *Speiser v. Randall*, 357 U.S. 513, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, *Carter v. Carter Coal*, 298 U.S. 238, and *Coppage v. Kansas*, 236 U.S. 1—each of which but the last does not support appellants' position. And, while *Coppage* does express the same view of the public good, and particularly of the inutility of labor unions and the transcendent value of individual contract, which underlies appellants' policy arguments here, it represents a long-discredited approach to the Fourteenth Amendment and to the role of this Court in its enforcement. As the Court emphasized in *Lincoln Federated Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 537, the modern constitutional philosophy—that courts do not substitute their views upon public policy for

those of state legislatures—controls whether it is labor or its adversaries who invoke the discredited doctrine of *Coppage*.

ARGUMENT

I

INTRODUCTION—THE ISSUE

The appellants maintain that "[t]his Court must * * * assume in passing upon the constitutionality of § 19 [of the Michigan Public Employees Relations Act ("PERA")] that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities" (Br. for Appellants, 19), and their argument proceeds on this premise. If this assumption was proper, the constitutional issue tendered but not decided in *Railway Employees Dept. v. Hanson*, 351 U.S. 225, *Machinists v. Street*, 367 U.S. 740, and *Lathrop v. Donohue*, 367 U.S. 820 (plurality opinion), would be before the Court. On this assumption, in other words, the Court would face a heretofore undecided question arising in an area of constitutional law in which the "self-imposed inhibition against passing on [a constitutional question] unless absolutely necessary to a decision of the case" (*United States v. U.A.W.*, 352 U.S. 567, 590), and the concomitant principle that such issues should be determined only when the record is "so shaped * * * as to bring [the constitutional question] before this Court as clearly and as sharply as judicial judgments upon an exercise of [governmental] power requires" (*United States v. CIO*, 335 U.S. 106, 126 (concurring opin-

ion) have received particular emphasis.¹ But, as we show at the outset, the assumption from which appellants would have this Court proceed is refuted by the decision under review. Thus, the sole question which is before the Court is the constitutional issue which *was* decided in *Hanson*, *Street*, and *Lathrop*, squarely in favor of the present appellees' position.

A

Since this case was determined by the Michigan courts on the pleadings, the complaint defines its parameters. Plaintiffs in both cases now consolidated alleged that they are teachers in the Detroit public school system who "have refused to pay * * * regular monthly union membership dues or service fees * * *" (App. 11, 46) in the face of an "agency shop" clause in the agreement between the defendants—the Detroit School Board ("Board") and the Detroit Federation of Teachers ("DFT"), the exclusive bargaining representative of teachers employed by the Board—stating:

¹ See also *Hanson*, *supra*; *Street*, *supra*; *Lathrop*, *supra*; *Pipefitters v. United States*, 407 U.S. 385, 400. The constitutional questions not reached in *CIO*, *U.A.W.* and *Pipefitters* involved the constitutionality of statutory limitations under 18 U.S.C. § 610 upon the use of voluntarily paid union dues for certain political purposes and of voluntary contributions by union members to separate political funds maintained by unions. These issues are, however, interrelated with the issues in the *Hanson* line of cases, for as this Court recognized in the *Street* case:

"Whatever may be the power of Congress to forbid unions altogether to make various types of political expenditures * * * an injunction [against all political expenditures by a union which receives some exacted dues] would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters." (367 U.S., at 773.)

"A. All employees, employed in the bargaining unit, or who become employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members." (App. 44.)

The complainants sought, as pertinent here: (1) a declaration that the agency shop clause is "void and of no effect," as "contrary to the provisions of the Constitution of the United States," because, *inter alia*,

"[the] Defendant Federation [is] engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board and * * * a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs * * * and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board" (App. 13-14);

(2) a declaration that "defendants may not as a condition to the tenure and continued employment of Defendant Board of Education [sic], require that Plaintiffs pay dues

or a service fee to Defendant Federation" (App. 52.);² and (3) an injunction prohibiting the Board from discharging them pursuant to the agency shop clause. (App. 52.)

The trial court denied all relief. (App. 35-37, 75-77.) On appeal, however, the Michigan Court of Appeals reversed and remanded the trial court judgment.³ That court affirmed on the authority of *Hanson*, the "requirement for financial support of the collective bargaining agency by all who receive the benefits of its work." (App. 100, quoting *Hanson*, 351 U.S., at 238.) It also reached the issue not decided in *Hanson* but treated in *Street*—"whether or not funds collected pursuant to any agency shop clause could constitutionally be used for * * * activities that could be termed political" (App. 100-101) and held:

"[E]mployees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection." (App. 104.)

² The *Abood* plaintiffs also sought relief on the authority of the agency shop clause (App. 47, 50, 51), which provided that a teacher contesting the legality of the agency shop clause in court may not be discharged while such suit is pending final decision. (App. 45.) No teacher has been discharged because of non-compliance with the agency shop clause. (See Br. for Appellees, 6.)

³ When the trial court first denied relief in *Warczak* it ruled, among other things, that no constitutional rights were abridged by the agency shop clause, and that the PERA permitted such a clause. (App. 29-37.) On appeal, the Michigan Supreme Court remanded on the statutory interpretation question in light of another case in which it held similar agency shop clauses not authorized by statute. (App. 59-60.) The trial court then reconsidered the statu-

Thus, the plaintiffs did receive part of the relief sought in their pleadings: The Michigan courts declared that public employees who are covered by an agency fee provision may not be required to fund political activities of the union, and that each such employee who files a proper protest is therefore entitled to a rebate of the "portion of his money expended by the union * * * for causes and candidates to which he objects." (App. 104.)

Obviously, appellants may not appeal from this portion of the judgment, since it was in their favor. And appellees have not cross-appealed, nor have they questioned the propriety of this declaration in their brief. Indeed, appellee DFT has amended its Constitution since the state appeals court decision to provide a rebate procedure for those agency fee-payers registering a protest to the expenditures of the DFT for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment." (Br. for Appellees, Appendix B.)⁴

tory interpretation question under an intervening amendment to the PERA specifically authorizing an agency shop clause of the kind here in question, and held the amendment to be retroactive and to validate the clause in question. (App. 72-77.) The Court of Appeals reversed this retroactivity holding. (App. 100, 104, 106.)

⁴ The procedure thus enacted goes beyond that required by the appeals court, since it provides rebates for activities other than support of candidates and lobbying. Moreover, the amendment requires for a pro-rata rebate only a general protest to all such uses, while the appeals court opinion can be read to require a specification of "the political causes to which [a fee-payer] * * * was opposed." (App. 103-104.) Finally, the procedure now included in the DFT Constitution provides procedural protections, including review by a panel of non-members of the DFT, as part of the rebate procedure. (Br. for Appellees, Appendix B.)

In short, the state court has now held that the statute is constitutional only insofar as it requires financial support of the bargaining agents' non-political activities. That holding has been accepted and implemented by the defendants. This being so, the agency shop clause in question and the statute authorizing it are valid in Michigan only on the condition that any properly objecting employees may obtain a reimbursement for political expenditures, and they may be attacked in this Court only on the understanding that they will be so applied. (See, e.g., *Law Students Research Council v. Wadmond*, 401 U.S. 154, 157-158 n.8, 164 n.18.)

The question of the constitutionality of the use of exacted fees for political expenditures, a question this Court has thrice declined to reach in the exercise of judicial restraint (see *Hanson*, *Lathrop*, and *Street*), is consequently not presently here on this appeal.⁵ And, in light of the action below

⁵ Even if that question were here, there is another reason why this Court ought not to determine it in this case. While the Michigan Court of Appeals determined that this issue was squarely before it, in fact the issue came to that court in precisely the same posture as it was presented to this Court in *Hanson* and *Lathrop*. In both *Hanson* and *Lathrop*, as in this case, there were allegations that a portion of the compelled payments would be used for political purposes, and that plaintiffs objected to such expenditures. But such allegations were deemed insufficient by a unanimous court in *Hanson* and a plurality in *Lathrop*. For, as the *Lathrop* plurality noted:

"Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon the rights of free speech through the use of exacted dues is [not] concretely presented for adjudication * * * Nowhere are we clearly apprised as to the views of the appellant on

and the appellees' response thereto, the question which is before the Court is somewhat narrower than that involved in *Hanson* and *Lathrop*, since in those cases it was not clear, as it is now here, that those protesting the compulsion to provide financial support to an organization had a right to refund of a pro-rata proportion of the monies paid to the extent of any political expenditures by the organization.

any particular legislative issue on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. * * * The [Wisconsin] Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected." (367 U.S., at 845-846.)

Thus, although the Wisconsin Court in *Lathrop* had reached the constitutional question regarding political expenditures, this Court was not constrained to do so where the specificity appropriate to constitutional adjudication was not present; relying on *Hanson*, the plurality determined not to do so. And, in *Railway Clerks v. Allen*, 373 U.S. 114, 118-119, n.5, a Court majority affirmed the propriety of the *Lathrop* plurality ripeness decision, distinguishing the holding in *Allen* that objection to specific expenditures was unnecessary to relief on the ground that *Allen* (and *Street*) did not involve, as *Lathrop* did and this case does, constitutional adjudication.

The record in this case suffers even more severely than did those in *Lathrop* and *Hanson* from a lack of specificity as regards the political expenditures issue. Consequently, and particularly in view of the fact that the Michigan courts recognized the existence of a constitutional right in regard to political expenditures and protected whatever such right there may later prove to be, the restraint exercised by this Court in *Hanson* and *Lathrop* ought also to obtain here.

Therefore, the only issue on the merits in this case is whether a public employee may be required, as a condition of his employment, to pay a fee to defray the non-political expenditures of the union selected by the majority of his fellow employees in an appropriate unit as the exclusive bargaining representative of all employees in the unit. This issue is analogous, although more narrow, to the issue which was decided in *Hanson and Lathrop* and, as we show in Part II, *infra*, those precedents control the decision here.

B

Appellants in their second Question Presented (Br. for Appellants, 4) suggest that on the view taken by the Michigan Court of Appeals of the political expenditures question that court was obliged to enjoin in its entirety the application of the agency shop clause to them. The Court of Appeals held that the agency shop clause insofar as it permits the unions "over the employees' objection, to use his money to support political causes which he opposes" (App. 101) is invalid. It then stated that "whatever relief is fashioned can only be applied to those Detroit teachers who have specifically protested the use of their funds for political purposes to which they object," (App. 103), and went on to declare that a pro-rata restitutionary remedy would be appropriate, but:

"In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore, the plaintiffs are not entitled to relief on this basis." (App. 104.)

Point IV of appellants' brief, which is the argument addressed to the second Question Presented, is entitled "The

Teachers had standing to sue, and the injunctive relief they sought was in all respects appropriate." We note, first, that neither appellees nor the Michigan Court of Appeals ever suggested that appellants lack standing here. The court below did entertain appellants' claim on the merits and held, first, that the 1973 amendments to the PERA could not be applied retroactively, and second, that objectors' monies could not be used for political purposes. The statement that because the plaintiffs had made no specific objection "the plaintiffs are not entitled to relief on this basis" (A. 104) refers solely to the restitutionary remedy which that Court declared would be available to objectors in the future, and which appellants disclaim in their brief here. (See Br. for Appellants, 213-214.)

For this reason, the "overbreadth" doctrine appellants seek to invoke has no application whatever to this case. That doctrine permits

"[l]itigants * * * to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected [activity] * * * The consequences of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to [First Amendment rights]." (*Broadrick v. Oklahoma*, 413 U.S. 601, 612, 613.)

Here, the Michigan Court of Appeals by "partial invalidation" removed the only "threat or deterrence" to free expression rights which it perceived in the statute. This

action was sufficient—if that Court's reliance on *Hanson* for the proposition that the collection of agency shop fees is not itself unconstitutional is, as we maintain, correct—to protect First Amendment rights of all those affected. For, after the decision below, any public employee covered by an agency shop clause has the right, upon proper protest to a union which makes political expenditures, to receive a proportional rebate. Thus, "others not before the Court" as well as the actual litigants will in the future be protected against the constitutional infirmity perceived, and there is no reason whatever to interdict the statute entirely.⁶

At the outset of the argument in support of the proposi-

⁶ The contrast between this case and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, the most recent of the overbreadth cases appellants cite, is illustrative. In *Doran*, if the Court had merely held that, because the litigants did serve liquor, the statute was constitutional as to them, the possibly unconstitutional aspects of the statute there in question would remain—specifically, its application to places where no liquor was served—and activities of "unquestionable artistic and socially redeeming significance" (*id.*, at 933) would undoubtedly be discouraged by the threat of prosecution. Even if this Court had in *Doran* unequivocally stated that the statute was constitutional as applied to the litigants but unconstitutional as applied to certain other situations, the declaration of unconstitutionality would have been dicta, since it would have no effect whatever on the actual litigants or on the judgment rendered as to them; and, since it would be impossible in the abstract to define precisely in which case the application of the statute would be unconstitutional, a deterrent effect on possibly protected activity would remain. Here, in contrast, the declaration protects entirely both these litigants and everyone else affected by the statute.

Appellants' reliance, in this connection on *Shuttlesworth v. Birmingham*, 394 U.S. 147, also shows their inattention to the reasoning of this Court's decisions, as opposed to who won or lost the case. The reason that the conviction in *Shuttlesworth* was reversed

tion that "the injunctive relief [appellants] sought was in all respects appropriate," appellants state flatly: "There can be no doubt, after consulting the decisions of this Court in similar cases, * * * that the injunctive relief they prayed was not only an appropriate remedy but indeed the *only* remedy for the unconstitutional conduct here challenged." (Br. for Appellants, 199, emphasis in original.) And they conclude that portion of the argument by asserting: "For that reason, an injunction against enforcement of the agency-shop scheme is the *only* adequate remedy in this case." (Br. for Appellants, 214, emphasis in original.)⁷

Yet, that injunctive remedy is the one that the plaintiffs in the *Street* and *Allen* cases had sought and obtained in the

was that, at the time the defendant acted (*id.* at 156-157), the ordinance requiring a license to parade could fairly have been construed by him as leaving to the licensing authority absolute discretion as to whether the license should be granted.

"This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." (*Id.*, at 150-151.)

That is not the situation here, because once objection is made known, the union has no discretion to deny the employee a refund of the amount due pursuant to the financial statement which, under the decision below, the union will be required to furnish. As so applied, the statute passes muster under the reasoning of *Shuttlesworth* itself, in that portion of its decision where it assumed the Birmingham ordinance to be constitutional for the future under the Alabama Supreme Court's limiting construction which withdrew the objectionable discretion from the Chief of Police. (See *id.* at 155-156, following *Cox v. New Hampshire*, 312 U.S. 568.)

⁷ Thus, appellants do not contend in this Court that the courts below erred in denying them either of the remedies which *Street* and *Allen* did provide for the violation of the Railway Labor Act

state courts and which this Court, reversing those decisions expressly held was "impermissible." (See 367 U.S., at 771-772; 373 U.S., at 117-120.)

While they charge the court below with having misread those decisions, it is appellants who are in error. For, insofar as *Street* and *Allen* denied relief to the plaintiffs therein, those decisions were not merely "statutory interpretations" but also "constitutional adjudications", contrary to Br. for Appellants, 200-201. *Street* and *Allen* held that an employee has no constitutional right to be relieved of the obligation of paying dues to a union merely because the union expends money for political purposes, rejecting the identical claim under the First and Fourteenth Amendments which appellants assert here. (367 U.S., at 771; 373 U.S., at 119-120.) That being so, the Court disapproved the relief sought in those cases, since it "sweeps too broadly . . . [and] might well interfere with the . . . unions' performance of those functions and duties which the [statutory scheme] places upon them to attain its goal of stability in the industry." (373 U.S. at 120, quoting 367 U.S. at 771.)

which was there found. (367 U.S. at 744-775; 373 U.S. at 122.) On the contrary, they expressly disclaim, and reject, the restitution of a share of the required fees, the second of the remedies this Court sanctioned in those cases. (Br. for Appellants, 213-214.) It is our understanding that this Court does not sit to decide questions not tendered by the appellants.

Further, the Court of Appeals, as noted, decided this case, in accord with state procedure, on the pleadings; and, on the pleadings, there was indeed no "allegation that any of [the teachers] specifically protested the expenditures of their funds for political purposes" (App. 104), for the simple reason that the complaint alleged that "[p]laintiffs . . . have refused to pay . . . service fees." (App. 11, 46, emphasis supplied). Having refused to pay any service fees, plaintiffs clearly could not, and did not, protest spe-

II

THIS COURT, IN RAILWAY EMPLOYEES DEPT. V. HANSON, 351 U.S. 225, AND LATHROP V. DONOHUE, 367 U.S. 820, HAS ALREADY DETERMINED THE ONLY ISSUE IN THIS CASE

The question whether a state may constitutionally permit a public employer to enter into an agreement with a union (selected by the majority of the employees in an appropriate bargaining unit) setting, as a condition of employment, contribution toward the non-political expenditures of that union, has been definitively determined by this Court. *Hanson* decided this same issue with regard to railroad employees and did so explicitly on constitutional grounds. The Court's holding on this point in *Hanson* was accurately described in *Reid v. McDonnell Douglas Corp.*, 443 F. 2d 408, 410 (C.A. 10) (footnote omitted):

"In *Hanson*, Justice Douglas reasoned that the Railway Labor Act expressly superseded state laws prohibiting the union shop. Accordingly, contracts negotiated with a union shop provision necessarily carry the imprimatur of the federal law, the element which provides the required governmental action. Indeed one may argue further that the union shop is a device which Congress had decided to encourage in the railway industry by nullifying any state laws to the contrary. Union activity pursuant to such encouragement is thus within the traditional ambit of state action analysis under the fourteenth amendment—a concept bearing close analogy to the federal governmental action required to invoke the first and fifth amendments."

In other words, contrary to appellants' argument here, specifically expenditures from funds to which they did not contribute. This being so, they were "not entitled to any relief" of a restitutionary character.

Hanson was not simply a "preemption" case;⁸ rather, this Court determined that *because* the Railway Labor Act preempted state laws which forbade the union shop,⁹ there was sufficient state action to bring the Constitution into play and to require a decision on the compatibility of the union shop and the First and Fifth Amendments.

We need not demonstrate at length the appellants' error in this regard. For there can be no dispute that *Lathrop* did involve a requirement directly imposed by the state

⁸ Indeed, if, as appellants suggest, *Hanson* "is [solely] a preemption case" (Br. for Appellants, 194), it is difficult to perceive why this Court in *Street* construed the Railway Labor Act to preclude required financing of political expenditures, in order to avoid "constitutional questions . . . of the utmost gravity" concerning whether "Congress, in authorizing a union shop under § 2, Eleventh [may provide] that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." (367 U.S., at 747.) For surely, private employers are free, absent governmental intervention, to condition employment on any requirement, including the requirement that the employee contribute, directly or indirectly to a particular political party, or to political causes, without infringing any constitutional rights. (Cf. *Hudgens v. NLRB*, 424 U.S. 507.) Thus, unless § 2, Eleventh involved significant governmental compulsion, there would have been no constitutional question to avoid in *Street*.

⁹ As the *Reid* Court recognized, the reasoning by which the Constitution was brought into play in *Hanson* "has no applicability to the National Labor Relations Act" (443 F.2d, at 410). For, as the Court took pains to note in *Hanson*, 351 U.S., at 232, n.5, the NLRA, by virtue of § 14(b), "makes the union shop agreement give way before a state law prohibiting it." Thus, such an agreement does not have "the imprimatur of the federal law upon it." (*Id.* text. See *Retail Clerks v. Schermerhorn*, 375 U.S. 96.) That the preemptive effect of § 2, Eleventh of the RLA was the sole and indispensable basis for subjecting union security agreements to

itself.¹⁰ The issue posed there was whether a state may require all attorneys, as a condition of practicing their profession, to pay annual dues to a state bar association.

Appellants suggest that *Lathrop* did not decide *any* constitutional question. (See Br. for Appellants, 52-54.) This is a patent misreading of the opinions rendered in that case.

Two constitutional questions were raised in *Lathrop*: whether the state court could require "that appellant be an enrolled dues-paying member of the state bar [without abridging] his rights of freedom of association, and *also* [whether] his rights to free speech * * * were violated because the State Bar used his money to support legislation with which he disagreed." (367 U.S., at 823.) (Opinion of Brennan, J., emphasis supplied.) At least six members of the Court recognized that the state could not condition the practice of law on an abridgement of free associational

constitutional scrutiny is clear from the outset of the Court's discussion of this point in *Hanson*:

"The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska *nevertheless* took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 states." (351 U.S. at 231-232, emphasis supplied.)

This Court agreed with the Nebraska court's view on the state action issue. The decisions which find that the union shop agreements under the NLRA are the product of state action fail, we submit, to appreciate fully the narrow basis on which it was held to exist in *Hanson*.

¹⁰ Nor did *Lathrop* involve a state enactment confirming a pre-existing common-law right; attorneys have no right, absent legislation, to prohibit other persons from practicing law on any basis. (Cf. Br. for Appellants, 192.)

rights, but perceived no such abridgement in the required payment of dues alone.

Mr. Justice Brennan's opinion (for himself, Chief Justice Warren and Justices Stewart and Clark) concluded that a state:

"in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (*Id.*, at 843. See also, accepting this aspect of the plurality opinion's analysis, *id.*, at 850 (Harlan and Frankfurter, JJ., concurring).¹¹

The issue upon which there was no majority in *Lathrop* was the *second* constitutional problem raised, as to the use of the exacted funds for political expression, an issue which is not presently before this Court. (See pp. 7-14, *supra*.)

A.

Lathrop's Rationale Governs This Case

Both the plurality opinion in *Lathrop* (*id.*, at 842-843) and the concurrence of Justices Harlan and Frankfurter (*id.*, at 849) regarded the question whether a state may condition the practice of law upon financial support of an association representing the interests of all lawyers as constitutionally identical to the question whether the government may condition, or permit others to condition, employment upon

¹¹ It appears that Justice Black also agreed with this holding, and dissented only on the second question. (See *id.* at 877, Black, J., dissenting.)

financial support of a union representing all employees in a bargaining unit. And the conclusion that the agency shop clause in this case must be constitutional if the integrated bar concept is valid does appear inescapable.

First, the requirement imposed here and in *Lathrop* is identical: to provide financial support, but not any other form of support, to an association of others similarly employed. Thus, in this case, as in *Lathrop*, the Court is "confronted . . . only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." (*Id.*, at 828.)

Indeed, the degree to which the government here has compelled appellants to "associate" with an organization is considerably more attenuated than in *Lathrop*. In *Lathrop*, while the attorney was "free to attend or not attend the association's meetings or vote in its elections as he chooses" (*id.*, quoting 10 Wis. 2d 230, 237), and in that sense was not compelled "to associate with anyone" (*id.*), he *was* required to enroll as a member of the organization. Here, there is no such requirement.

Further, in *Lathrop* the state designated the organization in which membership was compelled, and the attorneys affected had no vote either upon whether there was to be an organization to perform certain functions, or upon which organization it was to be. In contrast, the teachers here had a direct voice in whether there was to be an association at all representing them and their fellow employees (PERA §§ 423.212, 423.214), and if so, which organization it was to be; and their right to seek to displace that association, together with a procedure for doing so, is protected by statute. Thus, not only is it merely financial support which is com-

pelled, but the right not to associate with the union in other ways, and to associate with those opposed to the union, is accorded recognition.

Second, the consequences of non-compliance here and in *Lathrop* are identical: the individual may lose his present means of support. For the consequence of non-compliance with the dues-paying requirement in *Lathrop* was exclusion from the practice of law in the state, while the consequence here is, similarly, exclusion from employment as a teacher in the Detroit Public Schools. Once again, in fact, the *Lathrop* sanction is if anything more onerous than in this case: the attorney in that case would be excluded for non-compliance from following his calling anywhere in the state and for any employer; teachers here would be excluded, even if they were unwilling to pay dues to *any* union, only from all teaching positions in Michigan in which there was an exclusive bargaining representative *and* that representative and the employer agreed to agency shop clause.¹²

Third, the state interest served by the requirement here and in *Lathrop* is quite similar—to spread among all the members of a group engaged in certain employment the costs of programs relating to that employment and thought to benefit both the public generally and, in particular, the persons so employed. In Part III (B), *infra*, we discuss the economic justification for the dues requirement in the collective bargaining situation. This discussion will demonstrate that the reasons underlying the agency shop requirement

¹² And, of course, if their objection is only to the DFT, they would be excluded only from the schools in which employees are represented by that union and there is an agency shop clause in effect.

are if anything more compelling than the reasons for an integrated bar. For many of the functions of the integrated bar outlined in *Lathrop* do not involve a benefit to the lawyers who choose not to participate directly in its programs, except in the remote sense that an individual attorney may benefit from being part of a profession well-regarded by the public. But the employees here receive, because of the exclusive representation concept and its corollary duty of fair representation, direct benefits from the activities of the union. Thus, the agency shop principle is based not solely on general public policy considerations but on fundamental notions of economic equity basic to much governmental action. (See Part III (B), *infra*.) This distinction seems to have been decisive for Mr. Justice Douglas, and explains why he dissented in *Lathrop* after authoring *Hanson* and concurring in *Street*. (See *Lathrop*, 367 U.S., at 879.)

The extent to which *Lathrop* must be controlling here may be seen more clearly if it is considered that the state undeniably could, after that decision, constitutionally impose with regard to teachers the same requirement imposed in *Lathrop*—that is, the state could require that *all* teachers, as a condition of practicing their profession, belong to a statewide organization of teachers engaged in activities similar to those performed by the state bar. Such an organization could perform many of the same functions performed by the DFT,¹³ but it would have no power to compel employers to bargain with it, and thus to affect teachers' economic status and working conditions directly rather than

¹³ For example, postgraduate education, publication of professional journals, professional meetings and seminars, publications for comment on new educational theories, group insurance, handling

indirectly. Since the government here has imposed a requirement less restrictive in several ways, as noted above, than that which would be constitutionally valid, while at the same time assuring a tangible and direct *quid pro quo* for the monies paid, the validity of the agency shop clause is evident.

B.

Appellants' Efforts to Distinguish Lathrop Are Unavailing

Appellants seek initially to separate *Lathrop* from this case on the basis of "the peculiar public character which lawyers acquire as court-officers." (Br. for Appellants, 55.) But the teachers here are different from the lawyers in *Lathrop* only in that their employment is not "quasi-governmental" (*id.*), it is governmental. Thus, while the pertinence of the distinction is far from obvious, it is clear that the "peculiar public character which lawyers acquire as court-officers" (*id.*) cannot render requirements valid as to them but not as to employees whose "public character" is in no way "peculiar." Surely, the government has as legitimate an interest in the effective running of schools as it does in the operation of the courts.

Appellants suggest also that in *Lathrop*, the organization whose support was required was a "public-serving agency," while the "activities of the Union * * * are self-serving, * * * antagonistic to the interests of taxpayers and of the public agencies which employ the Union's members,"

grievances, economic efforts to improve teachers' economic status, studies of teachers' salaries, and promotion of free tutorials would all be activities precisely parallel to those performed by the state bar in *Lathrop* (see 367 U.S., at 840-842) and are similar to functions now performed or which could be performed by the DFT.

and "in aid of the subversion of the legislative and administrative process for the private benefit of the Union's members [and pose] a substantial threat to representative government." (Br. for Appellants, 56, 176.) To state this "distinction" is to expose its irrelevance to constitutional adjudication. The legislature in authorizing public employee collective bargaining clearly made the judgment that the participation of public employee unions in setting the terms and conditions of employment does serve the public interest, and is neither "antagonistic" to the good of taxpayers and public agencies nor "subversive" in any sense. For, while the collective bargaining system does posit that unions will act in the interest of the employees they represent, it also posits that in doing so the unions will thereby be part of a process resulting in more stable and just labor relations and thereby a more efficient and productive work force. (Cf. PERA § 423.210(2).) That appellants and other citizens may disagree with the legislature's judgment in this complex area is, of course, entirely immaterial either to whether the government's interests are legitimate or to the weight to be accorded those interests.¹⁴ In the *Lathrop* situation, for example, that fact that many citizens believe that lawyers do not in fact serve the public interest and that we would all be better off without them, a view stated most

¹⁴ This same misconception of the courts' role in constitutional adjudication pervades much of Appellants' argument. Nearly one-third of Appellants' Brief (pp. 62-80, 103-105, 111-112, 120-128, 137-153, 161-164, 167-186) is devoted to various attempts to demonstrate that public employee collective bargaining does not in fact advance the good of the public and, therefore, the state's determination to the contrary ought to be disregarded. But the premise that decisions as to where the public good lies is not the business of the courts but of democratically elected legislators underlies the

emphatically by Shakespeare, in King Henry VI, Part II, or that lawyers as a group have too much power already and promoting an organization of lawyers therefore is contrary to the common good, had no place, and ought to have no place, in assessing the constitutionality of the integrated bar scheme.

C.

Lathrop Disproves Appellants' Theory That All Activities of Public Employee Unions Are Political Activities

Lathrop is helpful in approaching this case for one additional reason: it makes clear that appellants' argument that public employee bargaining is inherently political and,

federal Constitution; and this Court has often reiterated that it sits to determine whether governmental action is constitutional, not whether it is wise. As Mr. Justice Holmes noted in dissent in *Adair v. United States*, 208 U.S. 161, 192, in regard to the precise question whether the legislative decision to promote unionism is entitled to deference:

"Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this Court agrees or disagrees with the policy pursued [Even if] the only effect [of a statute] were to tend to bring about the complete unionizing of laborers, I think that object alone would justify the act. I quite agree that the questions what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to their advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interests, not only of the [employees], but of . . . the country at large."

See also *Hanson*, 351 U.S., at 233-234:

"The ingredients of industrial peace and stabilized labor-man-

therefore, that *all* expenditures by public employee unions from exacted funds are constitutionally suspect, cannot stand. The plurality opinion¹⁵ in *Lathrop* reviewed the activities of the integrated bar association at length, and noted that "[t]he activities without apparent political coloration are many." (367 U.S., at 839.) Among those activities considered to be non-political, and as to which the exaction of fees were therefore considered not to constitute "any impingement upon protected rights of association," (*id.*, at 843) (emphasis supplied) were: postgraduate education of lawyers; publications for lawyers; handling of grievances; investigating and bringing legal actions upon unauthorized practice of law; giving opinions on legal ethics; setting up legal aid systems; preparing publications for the public on legal matters; and setting up programs "to further the economic well-being of the profession," including malpractice and other insurance. (*Id.*, at 839-842.) This list makes clear that the *Lathrop* plurality, in defining the line between activities raising *no* constitutional problem and those which *may*, used the "political" activity boundary in a narrow sense, to cover only activities involving

agement relations are various and complex. They may well vary from age to age and from industry to industry. What would be needful one decade may be anathema the next. The decision rests with the policy makers, not the judiciary."

See *id.*, at 241-242 (Frankfurter, J., concurring).

¹⁵ The concurring opinion (367 U.S., at 850) would have held the line between political and non-political expenditures of no constitutional significance at all, and would have held use of exacted fees for *all* the activities of the state bar, including promoting certain legislation, constitutional. Clearly, then, a majority of the Justices agreed at least that the activities considered "without . . . political coloration" by the plurality could be financed from exacted fees.

the promotion of specific legislation (see *id.*, at 835-839), and not activities which, while they might well (and were intended to) have an impact upon the functioning of the judicial system, did not involve intervention in the passing of statutes.¹⁶ The court system is assuredly part of the government; and since appellants' argument that public sector collective bargaining is inherently political really involves nothing more than the obvious proposition that

¹⁶ This discussion of the line drawn by the *Lathrop* plurality between "political" and other activities is not intended to indicate that we regard any, or all, expenditures from exacted fees for activities on the "political" side of the line as infringing upon the First Amendment rights of objecting fees-payers; nor did the *Lathrop* plurality so conclude. Indeed, the stress placed by the plurality upon the need for a well-developed record in this area suggests that it recognized that even if it were established that some expenditures for legislative activity constituted such an infringement, great care would be necessary in determining which.

In particular, we are troubled by the notion that expenditures to analyze and advise upon legislation which would have a direct and severe impact upon substantially all persons employed in a certain endeavor in regard to their employment may not be made from fees exacted from all such persons. For example, if the Wisconsin legislature were considering legislation to make legal malpractice insurance mandatory, or to set minimum or maximum legal fees, or to impose a special tax upon all lawyers, all attorneys would be affected financially if such legislation were passed. In that circumstance, we cannot see why the fact that a bar association chooses to participate in the legislative arena rather than elsewhere is necessarily relevant to the cost-sharing principles basic to the integrated bar (and to the agency shop), or why attorneys may not be required to support activities regarding such legislation when they may be required (as *Lathrop* holds) to support efforts of the bar association to deal with economic aspects of the profession when legislative intervention is not involved.

In contrast, the decision to support or not to support a particular candidate for public office will rarely represent this kind of

negotiated agreements will have an impact upon how the government is run, collective bargaining activities are not "political" in the sense of the *Lathrop* plurality.¹⁷

III

THE AGENCY SHOP CLAUSE SERVES THE FUNCTION OF SPREADING THE NON-POLITICAL COSTS OF THE EXCLUSIVE REPRESENTATIVE AMONG ALL EMPLOYEES BENEFITTED; THIS PURPOSE IS ONE PURSUED BY GOVERNMENT IN MANY AREAS AND INFRINGES NO FIRST AMENDMENT VALUES WHATEVER.

The foregoing demonstrates that this case is indistinguishable from *Hanson*, and from *Lathrop*, and consequently that the agency shop clause, insofar as it requires support for non-political activities of the union, does not constitute "any impingement upon protected rights of association." (*Lathrop*, 367 U.S., at 843.) In this section, we explain further the interests served by the Michigan

ascertainable congruence with the common interests of the group: A candidate supported is not bound to forward the interests of those who promote his candidacy; and the candidate will be called upon while in office to act upon matters having nothing to do with those common interests and as to which the views and interests of those from whom fees are exacted will be entirely divergent. For this reason, we would expect that any ultimate resolution of the issue left open in *Lathrop* will require careful line-drawing and, in all probability, distinctions between candidacy and issue support, and between issues supported.

¹⁷ The court below recognized this distinction, and encompassed in its ruling that certain expenditures of the union would infringe the First Amendment rights of objecting fee-payers only expenditures for "support of candidates * * * and lobbying for the passage of bills in the legislature." (App. 101.) The propriety of this constitutional ruling, as noted, is not before this Court. (See pp. 7-14, *supra*.) The above analysis of *Lathrop* does make clear, however, that there is no First Amendment right here more expansive than that recognized by the Michigan Court of Appeals.

statute authorizing agency shop clauses for public employees, and then show that the ruling of the court below is fully consonant with more general principles governing the situations in which a government may exact fees from a group of people for certain purposes without infringing upon constitutional rights.

A.

The Theory of The Michigan PERA

The Michigan PERA was enacted in 1965 (1965 PA 379, MCLA 423.201 *et seq.*, MSA 17.455 (1) *et seq.*), and adopted for public employees in Michigan basically the same labor relations scheme as the National Labor Relations Act and the Railway Labor Act instituted decades earlier for most employees of private employers, with the single notable exception that the PERA does not protect but rather forbids strikes. Since the PERA was "modeled on the NLRA" (*Rockwell v. Crestwood School District Board of Education*, 393 Mich. 616, 635-636 (1975), appeal dismissed sub. nom. *Crestwood Education Association v. Board of Education of School District of Crestwood*, U.S., 44 U.S. L.Wk. 3747 (1976)), and the Michigan courts look to NLRA precedents and policies in interpreting the PERA (*id.*), the interests served by the PERA are best understood by comparison with the federal statutes with which this Court is familiar, and by reference to the well-developed body of federal law.

First, the structure of § 423.210(1), the section authorizing agency shop clauses, follows the same general pattern as the NLRA and RLA. Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by dis-

crimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This broad prohibition is subject to the proviso that an agreement may require the payment of dues to a labor organization as a condition of employment on or after the 30th day following the beginning of such employment, subject to limitations not presently pertinent. The broad language of § 2, Fourth of the RLA, likewise protects employees against discrimination in employment on the basis of union membership; but this is subject to the union shop proviso, § 2, Eleventh, which, of course, was the provision involved in *Hanson, Street and Allen*.¹⁸

Likewise, Section 423.210(1)(c) of the Michigan Compiled Laws (MCL) forbids public employers from discriminating "in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization". This prohibition, however, is subject to the proviso

"[t]hat nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in Sec. 11 [Sec. 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * *."

It is that proviso which appellants challenge in this action.

¹⁸ For present purposes the major differences between the treatment of this issue under the NLRA and the RLA is that the latter does not permit state laws which forbid the union shop to operate. (See the discussion of *Hanson* at pp. 19-20, *supra*.)

Its purpose has been declared by the Michigan legislature not merely in debate but in positive law. For § 423.210(2) of the Act declares:

"It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative, by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative."

This is the same purpose which this Court in *Hanson* found underlies the union shop provision, § 2 Eleventh, of the RLA, and held to be constitutional:

"One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work.

. . .

To require, rather than to induce, the beneficiaries of trade unionism to contribute to its cost may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here." (351 U.S., at 235.)¹⁹

¹⁹ The same purpose is achieved by the union shop proviso to § 8(a)(3) of the NLRA, as amended in 1947. As this Court said last Term in *Oil, Chemical & Atomic Workers, etc. v. Mobil Oil*, U.S., 44 U.S. L.Wk. 4842, 4845:

"Quite apart from the safeguards that it provided, Congress' decision to allow union security agreements at all reflects its concern that, at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of

Second, the function of the bargaining representative under the PERA and the services that it performs on behalf of all the employees in the bargaining unit also parallel that of the representative under the RLA and the NLRA. Under each of these statutes the law-making authority has determined that employees shall have the right, if they choose to do so, to bargain collectively with their employer in determining the conditions under which they shall offer their labor. Thus, § 423.209, entitled "Right to Organize, Bargaining Collectively," of the PERA provides:

"It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

This provision parallels the first sentence of § 2 Fourth of the RLA²⁰ and § 7 of the NLRA.²¹ In aid of that right the

union representation without paying for them. Again, the focus of this concern is *not* the hiring process, but rather the benefits to be derived from union representation during the period of employment—while the employee is on the job. Thus, the Senate Committee Report on what became the Taft-Hartley Act observed that § 8(a)(3) gives 'employers and unions who feel that [union security] agreements promoted stability by eliminating "free riders" the right to continue such arrangements.' S.Rep. No. 105, 80th Cong., 1st Sess., 7, 1 Leg. Hist. 413."

²⁰ "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

²¹ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

legislature declared (in § 423.210(1)) certain conduct by public employers (or their officers or agents) to be unlawful. This list of illegal action is almost precisely parallel to § 8(a) of the NLRA which defines employer unfair labor practices.

Similarly, and of central importance to this case, PERA § 423.210(1)(e), which makes it unlawful "to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of" § 423.211—the "exclusive representative" provision of the PERA—closely tracks § 8(a)(5) of the NLRA, which declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)"—the exclusive representative provision of NLRA. In turn, § 423.211 provides as follows:

"Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act."

agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment."

This follows almost *in haec verba* § 9(a) of the NLRA, which we set forth in the margin.²²

The drafters of the NLRA declared the purposes of exclusivity:

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. . . . [And] majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf after representatives have been picked by the majority to represent all. . . . Employers, likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by

²² Section 9(a) of the NLRA provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive rep-

the majority than with numerous warring factions.” (S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), at 13.)

Thus, “it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions * * *.” (*Medo Photo Supply Corp. v. Labor Board*, 321 U.S. 678, 684, following *J. I. Case Co. v. Labor Board*, 321 U.S. 332, and (under the RLA) *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342.) In *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 62, this Court held:

“Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1947). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power,¹³ in full awareness that the superior strength of some individuals or groups might be subordinated to the interest

representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-

of the majority. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 338-339 (1944); H.R. Rep. No. 972, 74th Cong., 1st Sess., 18 (1935).

¹³ In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: ‘Without them the phrase ‘collective bargaining’ is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves.’ 79 Cong. Rec. 2372 (1935).”²³

Under federal law, this power of the exclusive bargaining representative “is not without limits.” (*Hines v. Anchor Motor Freight*, 424 U.S. 554, 564.) As this Court reiterated in *Hines (id.)*:

“Because ‘[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,’ *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, ‘the responsibility and duty of fair representation.’ *Humphrey v. Moore*, [375 U.S. 335,] at 342.”

See also *Emporium*, 420 U.S., at 64; *NLRB v. Allis-Chalmers*, 388 U.S. 175, 181.²⁴

That doctrine has been unqualifiedly embraced by the

bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.”

²³ See also *Hines v. Anchor Motor Freight*, 424 U.S. 554, 563; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180.

²⁴ Of course, under the RLA, too, the representative of a craft or class is, under § 2, Second, the *exclusive* representative (see *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 197-201), and therefore owes the duty of fair representation to the entire craft or class, (*id.*, at 202, 203).

Michigan Supreme Court with respect to bargaining relationships governed by Michigan law,²⁵ and has been applied by the lower courts of that state in the case involving the same defendants as this case.²⁶ Nor do appellants contend that the union does not under state law owe them the duty of fair representation; instead, they assert that they would prefer to bargain with their employer individually.

B.

Requiring All Those Represented By A Bargaining Representative To Contribute To Defray The Agent's Non-Political Costs Is An Economic Regulation That Does Not Infringe Upon First Amendment Values

From this analysis, it becomes clear that the PERA, like the RLA and the NLRA, encompasses a set of inter-related policy determinations with respect to labor relations. These include the fundamental decision that employee wages, hours and working conditions are to be determined by collective bargaining when a majority of the employees choose representation for that purpose; the assignment of certain functions and responsibilities to the chosen representative, including the exclusive representative's duty of fairness to all the represented employees; and the legislative decision that the costs of maintaining the activities of the representative which the employees have chosen may be spread among all the employees upon whose behalf the union does, and is required to, engage in collective bargaining and the pursuit of grievances. The validity of the latter

²⁵ *Lowe v. Hotel and Restaurant Employees Union*, 289 Mich. 123, 205 N.W. 2d 167.

²⁶ *McGrail v. Detroit Federation of Teachers*, 82 LRRM 2623 (Wayne Circuit Court, 1973), *aff'd* Michigan Court of Appeals, No. 16493 (1974).

requirement must be assessed with reference to the purposes served by that requirement as part of a comprehensive system for setting employees' wages, hours, and working conditions.²⁷

"It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality * * *." (*Usery v. Turner Elkhorn Mining Co.*, U.S., 44 U.S.L. Wk. 5181, 5186.) We would state the basic governing proposition in *Hanson* and this case to be that the presumption of constitutionality as to legislation designed to adjust economic costs and benefits in an equitable manner is not lost merely because this is done by enforcing payments to an organization which has particular statutory responsibilities to a group broader than its own membership. This is so especially where those responsibilities involve activities in which individuals do not have any constitutional right to engage on their own behalf, and where the organization is

²⁷ Appellants suggest that this Court consider the validity of an agency shop clause in isolation, without regard to the exclusive bargaining principle. (Br. for Appellants, 101-102.) To do so, in light of the degree to which the exclusive bargaining role of the union is the primary justification for imposing cost-sharing, would be akin to determining whether to construct a roof without regard to whether or not there is a building.

As one reason for ignoring the context in which the agency shop clause has been authorized in assessing its validity, appellants suggest that exclusive bargaining for public employees may itself be unconstitutional. (Br. for Appellants, 102.) But as appellants concede, the constitutionality of exclusive bargaining for public employees is *not* at issue in this case.

Therefore, *Schlesinger v. Ballard*, 419 U.S. 498, demonstrates the fallacy of appellants' suggestion. There, this Court was faced with the question whether a man was denied equal protection because he was subject to being ousted from the Navy for non-pro-

democratically selected by a majority of those who will be affected by its activities.

1. In *Turner Elkhorn Mining Co.*, *supra*, this Court upheld a provision requiring mine operators to compensate for certain disabilities those employees who terminated their work in the industry before the statute requiring such compensation was passed. The Court noted that "we would * * * hesitate to approve the imposition of liability on any theory of deterrence" (44 U.S. L. Wk., at 5186), but held that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor * * *. Whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (44 U.S. L. Wk., at 5186-5187.)

The requirement imposed in *Turner Elkhorn* was not a tax but direct compensation to certain employees. Yet, it motion after a shorter period of time than women navy officers. The Court held that the differential was justified by the fact that women are generally accorded less opportunity for sea advancement in the Navy as a consequence of limitations upon combat and sea duty, and that "Congress may thus quite rationally have believed that a longer period of tenure for women officers would * * * be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" (*Id.*, at 508.) While the dissent found "quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader gender-based difference in treatment imposed directly and currently by the Navy itself * * * " (*id.*, at 511, n. 1) (Brennan, J., dissenting), the majority, noting simply that "[a]ppellee has not challenged the current restrictions on women officers participation in combat and in most sea duty" (*id.*, at 508), declined to raise or decide constitutional questions as to aspects of the statutory scheme not at issue in the case.

would have been odd, indeed, had the employers in that case argued that requiring them to pay money to former employees infringed their rights of non-association, although of course First Amendment rights of association (or non-association) do not depend upon the existence of a formal organization or upon the number of people associating. And, it appears quite plain the result in *Turner Elkhorn* would have obtained if, instead of requiring direct payment to disabled employees, Congress had required the purchase of liability insurance from a private company or companies for that purpose. Many states, of course, have long imposed such a requirement upon users of automobiles (see *Ex Parte Poresky*, 290 U.S. 30, 32; *Continental Baking Co. v. Wooding*, 286 U.S. 352), and some persons are, because of their driving records, even assigned to a particular insurance company from whom they must purchase insurance. While an insurance company is assuredly an organization, and citizens may have reasons for not wishing to "associate" with it, requiring persons who engage in a certain activity to make payments to such organizations in exchange for a service, even if those persons would prefer to do without that service and bear the risks of doing so, has never been suggested to give rise to a legitimate First Amendment claim.

The reason why the First Amendment is not implicated where there is nothing more than a compulsion to purchase from an organization an economic service one would rather do without is not, of course, that the First Amendment does

Moreover, there is nothing to the proposition that statutorily authorized exclusive bargaining for public employees is unconstitutional. We have so demonstrated in the Brief *Amicus Curiae* for the AFL-CIO in *City of Madison v. WERC*. No. 75-946, at pp. 17-20 (see also pp. 8-16), and we refer to that discussion rather than repeating the argument.

not protect expression directed toward economic advancement, or the association of individuals for that purpose, for it does. (See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —, 44 U.S. L. Wk. 4686, 4689-91.) Nor is it because the payment of money never constitutes a protected form of expression or association, for it can. (See *Buckley v. Valeo*, 424 U.S. 1, 21). Rather, the First Amendment at its broadest does not protect the pursuit of economic activities as such, or association for that purpose. (Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 493-497; *Thomas v. Collins*, 323 U.S. 516, 543-544 (Douglas, J., concurring); see also *United States v. O'Brien*, 391 U.S. 367, 376-377.)²⁸

To illustrate: There is a First Amendment right to advocate either collective or individual bargaining for employees, and to join together to do so.

“[P]rotected ‘union activities’ include advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to employees and to the public. For that reason, the State may not broadly condemn all union activities or discharge the employees simply because they join a union or participate in its activities. *It does not follow, however, that all activities of a union or its members are constitutionally protected.*”

“Thus, the *economic activities of a group of persons* (whether representing labor or management) *who associate together to achieve a common purpose are not*

²⁸ Even organizations whose primary purpose is expression are not entitled to special treatment under the First Amendment of their economic behavior. (*Associated Press v. NLRB*, 301 U.S. 103, 132-133; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193; *Associated Press v. United States*, 326 U.S. 1; *Grosjean v. American Press Co.*, 297 U.S. 233.)

protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy.” (*Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 436, 460, 461 (C.A. 7) (Footnotes omitted; emphasis supplied).)

Consequently, “there is no constitutional duty [of a public employer] to bargain collectively with an exclusive bargaining agent.” (*Id.*, at 461, following *Indianapolis Education Assn. v. Lewallen* 72 LRRM 2071, 2072 (C.A. 7); see Brief for the AFL-CIO as *Amicus Curiae* in *City of Madison v. WERC*, No. 75-946, pp. 11-20.) For that reason, there is no First Amendment right to associate, or not to associate, by the payment of money or otherwise, in order to engage in the collective bargaining process. Similarly, there being no First Amendment right to compensate an individual for loss, or to contract for insurance, there is no concomitant right not to do so.²⁹

2. Just as there are situations such as that involved in *Turner Elkhorn* in which certain individuals cannot engage in economic activity without imposing unintended harm upon others and it is just (and not unconstitutional) to require them to absorb the costs imposed on others insofar as can be done through financial transfers, there are also

²⁹ In *City of Charlotte v. Local 660, Firefighters*, — U.S. —, 44 U.S. L. Wk. 4801, a union “learned that it could obtain a private group life insurance policy for its members only if it had a dues checkoff agreement with the city,” the employer of its members. (*Id.*, at 4801.) In determining whether the refusal to grant the check-off was a denial of equal protection, this Court stated that it “would reject . . . if . . . made [the contention] that respondents’ status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause . . .” (*id.*, at 4802), thereby rejecting the notion that

situations throughout our society, and not merely in the exclusive representation context, in which a benefit cannot be provided for some individuals without providing benefits for others similarly situated, and in which equity therefore requires that, as long as there are democratic procedures for deciding whether or not the benefit should be provided, all share in the cost.

Economists denominate the benefit produced in such a situation as a "public good", a "collective consumption good", a "social want" or a "social good". One explains:

"For a good, service, or factor to be 'exclusive,' everyone but the buyer of the good must be excluded from the satisfactions it provides * * *. Commodities which are not subject to the exclusion principle are said to possess *spillover* effects * * *. If a good is a public good, it will not be produced privately and sold in the free market, even though it would be in society's interest to have it provided * * *. Because one cannot economically be excluded from the benefits of a public good once it has been provided, private firms have no incentive to produce and market these commodities. Any potential buyer would refuse to pay anything like what the commodity is worth to him. Indeed, he would be likely to express an unwillingness to pay anything at all for it. He would reason: 'If I simply sit tight and refuse to pay, I may get the benefit of the good anyway, if someone down the line provides it for himself—after all, it is a public good.' However, if each buyer reasons this way (and presumably he will), the good will not be provided. Public goods will only be provided if collective action * * * is taken. Only through collective action can the availability of worthwhile

impeding an economic object of the organization involved any First Amendment considerations.

public goods be assured." (R. Haveman, *The Economics of the Public Sector*, (1970) 25-26, 42-43.)

Another writes:

"Let us now take a closer look at the nature of social want * * *. Exchange in the market depends on the existence of property titles to the things that are to be exchanged * * *. This mechanism breaks down with social wants, where the satisfaction derived by an individual consumer is but one among many, and any contribution he may render covers only a small part of the total cost. Consider, for instance, such items as a flood-control project, the more general benefits of which accrue to an entire region; a sanitary campaign that raises the general level of health throughout an area; expenditures for the judiciary system that secure internal safety and enforce contractual obligations; or protection against foreign aggression. All these contribute to the welfare of the whole community. The benefits resulting from such services will accrue to all who live in the particular place or society where the services are rendered. Some may benefit more than others, but everyone knows that his benefit will be independent of his particular contribution. Hence, as we have said, he cannot be relied upon to make a voluntary contribution * * *. [C]ompulsion is called for * * * to determine the extent to which resources should be released for the satisfaction of such wants; the extent to which particular social wants should be satisfied; and the way in which the cost should be spread among the group. In a democratic society, the decision to satisfy one or another social want cannot be imposed in dictatorial form. It must be derived, somehow, from the effective preferences of the individual member of the group, as determined by his tastes and his "proper" share in full-employment income. A political process must be substituted for the market mechanism,

and individuals must be made to adhere to the group decision." (R. Musgrave, *The Theory of Public Finance*, (1959) 9, 10, 11.)

Although the examples usually given are collective as to the polity generally, public or collective goods may be such only with regard to certain individuals:

"One collective good goes to one group of people, another collective good to another group; one may benefit the whole world, another only two specific people * * *. It is of the essence of an organization that it provides an inseparable, generalized benefit. It follows that the provision of public or collective goods is the fundamental function of organizations generally. A state is first of all an organization that provides public goods for its members, the citizens; and other types of organizations similarly provided collective goods for their members * * *." (M. Olson, *The Logic of Collective Action*, (1965) 14 n.21, 15.)

The benefits provided by a labor organization empowered by statute to engage in collective bargaining are necessarily benefits of this kind:

"A labor organization works primarily to get higher wages, better working conditions, legislation favorable to workers, and the like; these things by their very nature ordinarily cannot be withheld from any particular worker in the group represented by the union. Unions are for "collective bargaining" not individual bargaining. It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a noticeable effect on the outcome, and whether he supported the union or not he would still get the benefits of its achievements." (*Id.*, at 76.)³⁰

³⁰ Olson goes on to point out that because of this situation—be-

Thus, the "free rider" problem which underlies the need for compulsory payment of union dues (see pp. 34-35, *supra*) is not at all unique to exclusive collective bargaining, and the solution embodied in the PERA—conducting a vote of the relevant populace as to whether a given service is to be provided and then requiring all those in that populace to submit to the will of the majority and provide financial support, but not any other form of support, to the project—is not unique either. Rather, there is a set of economic circumstances which arise with some frequency in modern society, and which is traditionally provided for in a democracy by substituting the right to express one's preferences by a vote in an election for the "vote" by purchase which prevails where a free market approach suffices because a rational person wishing a service would pay for it.

cause "a rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union" (*id.*, at 88)—

"[a]rguments about [compulsion to pay fees to a union] in terms of 'rights' are * * * misleading and unhelpful * * *. There is no less infringement of 'right' through taxation for the support of a police force or a judicial system * * *. Of course, law and order are requisites of all organized economic activity; the police force and the judicial system are therefore presumably more vital to a country than labor unions. But this only puts the argument on the proper grounds: do the results of the unions' activities justify the power that society has given them? The debate on the 'right-to-work' laws should center, not around the 'rights' involved, but on whether or not a country would be better off if its unions were stronger or weaker. * * *. For if, under all circumstances, the individual has a 'right to work' (the right to work without paying union dues), surely he must have the 'right not to fight' (the

Since the agency shop clause does nothing more than assess to the beneficiaries of an organization's activity the costs incurred by that organization on behalf of a group of people the majority of whom have selected the organization to perform certain functions for them, it is a classic instance of governmental intervention to readjust economic costs and benefits where the theory of the free market—that is, that individuals should make voluntary choices as to whether or not to purchase a good or a service—simply does not apply.³¹

right to avoid military service), and the 'right to spend' (the right to avoid paying taxes for government services he does not want). Collective bargaining, war, and the basic governmental services are alike in that the 'benefits' of all three go to everyone in the relevant group, whether or not he has supported the union, served in the military, or paid the taxes. * * * It may seem strange to draw an analogy between the union and the state. Some have supposed, with Hegel, that the state must be different in all of the more important respects from every other type of organization. But normally both the union and the state provide mostly common or collective benefits to large groups. Accordingly, the individual union member, like the individual taxpayer, will not be able to see by himself that the collective good is provided, but will, whether he has tried to have this good provided or not, nonetheless get it if it is provided by others. The union member, like the individual taxpayer, has no incentive to sacrifice any more than he is forced to sacrifice." (*Id.*, at 88-91.)

³¹ The costs legitimately spread in this way are not simply the direct cost of providing the service itself. For one thing, a union, like an insurance company or a government, has internal governance and communications costs which are a necessary incidence of providing the service. For another, a union, again like a corporation or a government, may perceive that it must expand its jurisdiction in order effectively to perform its functions. An insurance company, for example, may perceive that its ability to con-

Put another way, the teachers who are appellants here are necessarily, by force of their employment, in "association" with other teachers employed by the Detroit School Board. They work next to them in the same physical surroundings, apply the same educational policies, as determined by the Board, and are affected by the same working conditions—class sizes, hours, holidays, and so on. This would be the case whether or not there was a union representing the interests of employees. In all likelihood, given the size of the Detroit school district and the consequent need for bureaucratic organization, it would also be the case, whether or not there was a union, that one set of disciplinary rules and of wage and fringe benefit rates would govern all similarly situated teachers. Therefore, appellants and all other teachers employed by the school board are members of a group—that is, "a number of individuals with a common interest" (M. Olson, *supra*, p. 8)—even when there is no formal organization of those individuals. And the group is such that, at least in light of the exclusive bargaining principle and in all probability even without it,³² some members of the group cannot act to change aspects of the employment relationship without thereby affecting other members of the group.

tinue providing effective insurance to those compelled by government to purchase that insurance depends upon expanding its clientele, or upon acquiring other companies, and the costs of doing so are a legitimate incidence of the service provided.

³² This is because one premise of the majority rule principle in collective bargaining is that, given the character of labor relations, a group's ability to bargain with their employer, and the terms of the agreement negotiated, will be affected by whether or not there are other employees or potential employees similarly situated but not bound by the bargain struck. (See pp. 37-39, *supra*.)

Thus, even though the Detroit school teachers undoubtedly, like any group of American citizens, have widely varying personal views upon a large variety of matters, including the desirability of unions generally and public employee unions in particular, the fact is that all such teachers' employment relationships are bound up together whether they desire that circumstance or not, as long as they remain, voluntarily, teachers in the school system.³³ Therefore, while it is true that these teachers are "associated" in one sense with all the other teachers in the Detroit school system, that "association" is not forced upon them; it is voluntary or, at least, it is a necessary consequence of voluntary action. The permission to this group of employees to form a formal organization and, through that organization, bargain over terms and conditions of employment does not create an interdependence, where none existed before; it merely permits some input into the terms of employment by the interdependent group, where none had existed before.

³³ An analogy may be helpful. No one is compelled to drive an automobile, even though a governmental inhibition against a person doing so is such a disability in modern economic life as to give rise to a due process right. (*Bell v. Burson*, 402 U.S. 535.) But all individuals who do drive in a given area must usually drive over the same roads. Thus, it ordinarily is not possible to provide some people with good, safe roads and others with unsafe, bumpy roads. In this sense, although drivers have a range of views about questions of public policy undoubtedly as broad as the views current in the American populace generally, and probably also as broad a range of views upon whether it is wise to spend a great deal of money improving the highway system, all drivers constitute a group with a common interest in the quality of the roads. Therefore, once it is determined by a democratically elected body to build better roads, it is equitable to require all those who use the roads,

Since the only requirement imposed by the agency shop clause is financial, and since the duty with which the union thus supported is entrusted by statute is directly related to common aspects of the larger unorganized group which it represents, there is no meaningful sense, symbolic or otherwise (see *Buckley v. Valeo*, 424 U.S., at 21), in which exaction of fees itself is a requirement to associate. If there is a relationship among all the teachers, it exists aside from the existence of the union; and the union, as to non-members, is simply purveying a service, although, for the reasons indicated, and similarly to many other situations, the purchase of the service is obligatory.³⁴

Thus, this case really involves nothing more than a governmental decision that the costs of providing a col-

whether they initially favored the improvement or not, to pay for them (see *Continental Baking Co. v. Woodring*, 286 U.S. 352, 365-366; *Hendrick v. Maryland*, 235 U.S. 610, 623-624); this is done by the federal government through a gasoline tax which finances in part the Federal Highway Trust Fund (see Section 209 of Act of June 29, 1956, c. 462, Title II, 70 Stat. 397, as amended; see also 23 U.S.C. §§ 120, 126). Those who do not wish to pay such fees then have two options: first, not to drive; second, to seek to reverse the policy decision to build more and better highways, by voting against legislators supporting highway building and organizing others to do so.

³⁴ To illustrate once again with an analogy: Insurance companies usually provide health insurance more cheaply to a group of commonly-employed individuals than to single employees; and they may require all such employees to participate in order to get group rates, to prevent employees who are better risks from refusing to participate and thereby disturbing the insurance principle. All commonly employed persons may therefore have interdependent interests in this regard, whether they wish such "association" or not. And, we would expect, it would not be an unconstitutional condition of public employment to require all employees to enroll in a

lective economic benefit should be spread across all the members of the group benefitted; and the members of the group are, as they are in our society generally, given democratic rather than economic control over whether the benefit should be provided. Governmental action of this kind does not implicate First Amendment values at all and, consequently, the decision below, and the principles underlying *Hanson*, should be upheld.

3. It should be noted that the two conditions satisfied in this case—that the activities of the organization financed through exacted fees are primarily economic activities, and that there is a direct, collective benefit provided by the organization's activities—do not appear to be *necessary* to the conclusion that the exaction of fees does not infringe upon freedom of association. In *Lathrop*, for example, some of the main activities in which the state bar engaged *do* appear to be ones as to which there is First Amendment

designated health plan provided by an association or corporation, whether they wished the insurance or not, and whether the association or corporation also engaged in political activity or not.

This illustration, and the discussion in the text, show why appellants' heavy reliance on *West Virginia Board of Education v. Barnette*, 319 U.S. 624, is entirely misplaced. In his concurring opinion in *Lathrop*, 367 U.S., at 857-860, Mr. Justice Harlan demonstrated that the subsequent decision by a multipurpose organization to use exacted fees for political purposes is entirely different from, and of far less constitutional significance than, the compulsory affirmation of belief at issue in *Barnette*. Whether or not Justice Harlan's analysis is sufficient to dispose of the political expenditure question to which it was addressed, it certainly demonstrates that compulsion to pay for an economic service amounts neither to a required affirmation of belief in the necessity or wisdom of that service, nor forced adoption of political views expressed by that organization with funds otherwise derived.

protection—for example, publications on legal matters, and seminars for lawyers.³⁵ And, the benefit to lawyers generally from the state bar's program were not necessarily either economic or collective. That is, legal publications or continuing education class can be provided through a market system, for they do not have the characteristic that providing them for one person in a group will necessarily provide them for others; there is a collective benefit only

³⁵ This suggests that appellants' simplistic notion that every constitutional right necessarily entails "freedom either to act or to decline to act in respect of the subject in question" (Br. for Appellants, 40-41) is in error. For example, while the Seventh Amendment guarantees to a defendant in a criminal trial the right to a trial by jury, this Court has squarely held that a defendant in a criminal case is not constitutionally entitled to be tried before a judge alone. That was the precise holding of a unanimous court in *Singer v. United States*, 380 U.S. 24. (See the Court's discussion therein (*id.* at 33-34) of *Patton v. United States*, 281 U.S. 276 and *Adams v. United States ex rel. McCann*, 317 U.S. 269, both cited at Br. for Appellants, 41.) So too, for example, a defendant's right to a public trial does not carry with it the right to be tried in secret, and his right to be free from cruel and unusual punishment does not carry with it the right to have such punishment inflicted upon him, even though the defendant so desires on the basis of a deliberate judgment that he can thereby more completely cleanse his guilt. And, while the Establishment Clause of the First Amendment gives every citizen the right not to have a portion of his tax monies used to advance religion, a citizen who wishes some portion of his taxes to be used for religious purposes has no such countervailing right. Thus, whether and to what extent the Constitution creates a "freedom of self-determination" (Br. for Appellants, 98) cannot be derived solely by logic, implying the negative of a protected right; the answer requires in each instance that the precise freedom claimed be examined in light of the history and purpose of the constitutional provision which is invoked. This was the method of analysis in *Singer*, *supra*, and in *Faretta v. California*, 442 U.S. 806.

in the sense that there may be some intangible spillover advantage to all lawyers if some lawyers are better informed and better trained.³⁶

Similarly, in two recent federal cases, the question was whether it was constitutional to require all students at state universities to support, through special student activity fees, student government, student organizations, cultural activities, lectures on subjects of student interest and a student newspaper which expressed political views of the editors. (*Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C.), *aff'd per curiam* 526 F.2d 587 (C.A. 4), *cert. denied* 424 U.S. 913; *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D. Neb.), *aff'd* 478 F.2d 1407 (C.A. 8), *cert. denied* 414 U.S. 1135.) These organizations and activities clearly were such that students denied the opportunity to engage in them could claim First Amendment infringement. (*Healy v. James*, 408 U.S. 169.) Nonetheless, since the students had voluntarily become part of an educational institution, and since "the activities complained of were meaningful part of the educational process and complemented formal classroom instruction * * * to subsidize these activities from student fees violated no constitutional rights of the students." (*Arrington, supra*, 380 F.Supp. at 1363.)³⁷

There is no reason, however, to pursue this error further. For, it is at least the case that as to matters concerning which there is no right to associate, there is no right of non-association. That is the principle necessary to our present argument.

³⁶ This is the kind of collective benefit which justifies, for example, providing public schools at the expense of all living in a certain community, whether or not they use those schools for their children or have any children at all.

³⁷ The *Arrington* district court also confronted directly the question left open in *Lathrop*, and concluded that the fact that the newspaper in question also expressed the political views of its staff

Thus, it seems that governments have fairly wide latitude to exact fees from a group of people for the support of organizations serving all of those people in ways related to a common, special interest they share. That is, the activities of the state bar in *Lathrop* generally involved matters relating to legal practice; the activities supported by student fees in *Arrington* and *Veed* generally related to educational matters and university affairs; and the activities of the union in this case generally relate to the terms and conditions of employment of teachers. This case, however, because the two conditions noted above *are* satisfied, is a classic instance of government regulation of economic activities, and the further development of principles stating the limits of government imposed cost sharing where the benefit produced is non-economic, collective only in a more remote sense, and does involve protected activity should properly await cases involving those situations.

IV

APPELLANTS MISUSE THE DECISIONS OF THIS COURT

As we have shown in Part II, appellants' effort to escape the authority of *Hanson*, and its progeny under the RLA, and *Lathrop*, is based on incorrect readings of these decisions and is therefore futile. Appellants likewise misunder-

did not infringe the freedom of expression of those who disagreed with the views expressed but were required to contribute to the newspaper. In particular, the court stated that even if the student newspaper *were* considered a state agency, which it thought it was not for all purposes even though it was supported by exacted fees, "[T]he notion that it is unconstitutional and somehow violative of the rights of individual members of society for a government to advocate a particular position is erroneous." (*Id.*, at 1364.)

stand the decisions of this Court which they cite in their favor. Given the admittedly unusual length of appellants' argument (see Br. for Appellants, 9), it would only compound the burden on this Court were we to respond thereto in detail. We shall instead confine ourselves to appellants' major arguments which have not already been dealt with.

First, however, we shall address ourselves to another facet of their argumentative technique which is inimical to rational discourse: their willingness to assert, at different points of their brief, opposite sides of the same proposition. Appellants even expound a theory of governmental absolutism which would deny public employees any rights vis-à-vis their employer—a theory which, if accepted, would, of course, require rejection of their own claim for relief against the defendant Board of Education.

A

Whereas at the outset they state that “public employment may not be conditioned on non-membership in a labor organization” (Br. for Appellants, 34, and see the subsequent discussion *id.* 34-40, and the cases cited *id.* 35-36, n. 14)—a proposition with which we fully agree—appellants later assert: “We cannot imagine that a court true to its duty to protect our constitutional system could construe the First Amendment so as ‘absolutely’ to protect public employees in forming and joining unions *even when their actions were incompatible with the continued good order and proper functioning of government*” (*id.* 113-114, emphasis in original).³⁸ But this assertion, if accepted, would

³⁸ As appellants' subsequent argument shows, in their view the actions of all public employee unions are “*incompatible with the*

undermine appellants' entire case; if there is a freedom of non-association, it at least cannot have a broader scope than the freedom of association from which it is implied and which alone has thus far been recognized by this Court. (See n. 35, *supra*.) Thus, if there is no constitutional right to associate with unions, there surely is no right not to do so.³⁹

continued good order and proper functioning of government (*id.* 114, emphasis in original). Thus, according to them, membership in any public employee union is not constitutionally protected.

³⁹ For reasons we have explained, n.35, *supra*, the present case presents no occasion for determining whether the Constitution protects some forms of non-association; we may assume that it does. In particular, the case does not require the Court to decide whether, and in what circumstances, the Constitution protects the right not to be a formal member of an organization, or to participate in its affairs. The Michigan PERA does not require this. The very NLRA cases which appellants cite for the proposition “that the union-membership relationship is contractual—hence voluntary—in character” (Br. for Appellants, 44) draw this distinction between the obligation to pay dues to the union as a condition of employment, and the obligation to conform to the union's internal rules. (It is to be noted that the voluntary character of the union-member relationship under the NLRA is due not to any constitutional imperative, as appellants imply (Br. for Appellants, 44-45), but rather the express terms of the second proviso to § 8(a)(3) of the NLRA.) As was said in one of those cases, *Labor Board v. General Motors Corp.*, 373 U.S. 734, 742:

“It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. ‘Membership’ as a condition of employment is whittled down to its financial core.”

As so construed, the NLRA has been determined to be constitutional by every Court which has considered the question, even over the objection of those who claim, not some abstract right of non-association, but a direct interference with their religious scruples. (*Linscott v. Miller Falls Company*, 440 F.2d 14 (C.A.1), cert.

Even more strikingly, while appellants rely on the authority of those cases which establish the proposition—with which we, of course, also agree—that “public employment may not be conditioned on a surrender of constitutional rights” (Br. for Appellants, 23 *et seq.*) they subsequently assert a theory of governmental sovereignty which denies all rights whatsoever to public employees:

“In contrast to private business, government legitimately forces *everyone* to work for it, through taxation or the draft. To be sure, government does not customarily draft public employees; *but it has the authority to do so should society's needs require it.* This is the essence of its *sovereign* power and authority. But if sovereignty means the supreme and *unchallengeable* power of compulsion, in questions of public employment as elsewhere, it would be absurd to suggest that government could permit its employees to come under the control or influence of another authority—at least *while remaining sovereign.*” (Br. for Appellants, 181; emphasis in original.)

This theory of the nature of sovereignty and its implica-

denied, 404 U.S. 872; *Hammond v. United Papermakers and Paperworkers Union, AFL-CIO*, 462 F.2d 174 (C.A.6), cert. denied, 409 U.S. 1028; *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (C.A.9). See also *Buckley v. American Federation of Television and Radio Artists*, 496 F.2d 305 (C.A.2), cert. denied, 419 U.S. 1093.)

Nor does the present case require consideration of the question whether there is a constitutionally protected interest in being free from providing financial support to the partisan political activities of a labor organization, and if so, whether a particular interference with that right is justified by a subordinating compelling interest. For, after the decision below, the PERA imposes no such obligation on appellants. (See pp. 7-14, *supra.*) Thus appellants are not

tions was shared by Mr. Justice Holmes,⁴⁰ and appears to underlie—though it was not expressed in—his opinion in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517. Acceptance of that theory would, of course, entail dismissal of appellants' constitutional claim, for it grants the defendant Board of Education an absolute right to discharge them.

B

Appellants place heavy reliance on *Speiser v. Randall*, 357 U.S. 513. Insofar as *Speiser* is cited for the general proposition (which we and appellees accept) that the “right-privilege” dichotomy has been discredited, such reliance is justified. But insofar as *Speiser* is cited as authority for the narrower and controverted proposition that the service fee payments required under the PERA as construed by the Michigan Court is an unconstitutional tax on plaintiffs' asserted freedom not to associate, appellants' reliance on that decision is wholly misplaced.

The statute under attack in *Speiser* provided an exemption for all veterans, subject to the condition that the applicant for an exemption must take an oath that he does “not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostili-

addressing the statute as it is before the Court when they proclaim: “To the extent that they are required to finance the Union's political and ideological activism as a condition of continued public employment, the Teachers no longer direct their own social political destinies.” (Br. for Appellants, 96.)

⁴⁰ See *Kewananako v. Polyblank*, 205 U.S. 349, 353, citing, *inter alia*, Hobbes, *Leviathan*.

ties" (*id.* at 515). It thereby created two classes of veterans—those who did not so advocate, and were willing to take the oath, and those who did so advocate or refused to take the oath for some other reason. The former class received the exemption, the latter class was ineligible. Thus, the loss of the exemption penalized advocacy and/or refusal to take the oath. And, as the Court said in *Speiser*: "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech" (*id.* at 518). Here, however, there is no discrimination. The Michigan PERA creates only one class—teachers, all of whom are required to pay the service fee to the chosen representative. Teachers who do not wish to associate with the teachers' union, or who are opposed either to being represented or to any of the other activities of the teachers' union, are required to pay no more than the other teachers; indeed, under the decision below they have a right to pay less. Thus, there is no penalty at all based on the appellants' avowed desire not to associate with the union. Whether the payment is itself a form of association which cannot be compelled is a distinct question, but it is not one which the *Speiser* case addresses. The cases which decide that question are *Hanson* and *Lathrop*. (See pp. 19-31, *supra*.)

C

Appellants assert that the PERA is an unconstitutional "delegation of power to private parties to structure the public interest according to their own." (Br. for Appellants, 126, citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, and *Carter v. Carter Coal Co.*, 298 U.S. 238.) They state (Br. for Appellants, 60): "The still

powerful, viable, and sternly constitutional decision of this Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), is especially relevant here for its uncompromising insistence that government may not delegate to majorities of private groups, power over minorities which the government itself could not exercise."

We need not pause to consider how "powerful" and "viable" *Carter* remains in light of subsequent authority, e.g., *Curran v. Wallace*, 306 U.S. 1; for whatever may be the current status of the anti-delegation doctrine with respect to the federal government, state legislation is not subject to that doctrine, because the federal Constitution imposes no separation of powers requirement on the states. (*Dreyer v. Illinois*, 187 U.S. 71, 83-84,⁴¹ followed in *Uphaus v. Wyman*, 360 U.S. 72, 77.)

Appellants' citation, in support of this delegation theory, of the separate opinions of Justices Harlan and Douglas in

⁴¹ "A local statute investing a collection of persons not of the judicial department, with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."

Lathrop (Br. for Appellants, 126), is a further manifestation of appellants' total misunderstanding of that case. Mr. Justice Harlan not only rejected the view that self-regulation by lawyers under the integrated bar is *Schechter*-type delegation, but directly questioned the applicability of that doctrine to the states. (See 367 U.S., at 854-855.) And Mr. Justice Douglas, whose dissent in *Lathrop* is relied upon by appellants, understood that delegation of authority to a private group by a state raises no *federal* constitutional question. In the footnote to his dissenting opinion which appellants cite Justice Douglas said:

"A self-policing provision whereby lawyers were given the power to investigate and disbar their Associates would raise under most, if not all, state constitutions the type of problem presented in *Schechter Corp. v. United States*, 295 U.S. 495. See 1 Davis, *Administrative Law Treatise*, § 2.14." (*Id.*, at 878, n. 1, emphasis supplied.)

Further, while strong on rhetoric, appellants are quite vague in describing just what decisions Michigan *has* delegated to the unions. Surely, unions have not been delegated the fixing of terms and conditions of employment—these must be agreed upon by the public employer, here, appellee Detroit Board of Education. And they have not been delegated the power to determine whether a service fee must be paid by all employees in the bargaining unit as a condition of employment, or in what amount; these matters too must be agreed to by the public employer. Nor does the state delegate to the union the decision whether the employees shall bargain collectively, and if so, who their representative shall be; that is a decision left to the employees themselves.

D

One decision cited by appellants which is in point, and in their favor, is *Coppage v. Kansas*, 236 U.S. 1, 16-17 (Br. for Appellants, 112, 186). *Coppage* expresses the same view of the public good, and particularly of the inutility of labor unions and the transcendent value of individual contract, which underlies appellants' policy arguments here.⁴² And *Coppage* is one of the most important manifestations of the conception of the Fourteenth Amendment and the role of the Court in its enforcement which appellants necessarily embrace in urging this Court to substitute their policy judgment for that of the legislature of the State of Michigan. As to the first of these propositions, we do not feel called upon at this stage of history to present an apologia for the existence of the unions in general or public employee unions in particular; the view stated in *Coppage*

⁴² It is well to have before us the exact language to which appellants refer with approval:

"Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented." (236 U.S., at 16-17.)

was repudiated in this Court within less than a decade. (See *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209.) More importantly, "[t]his Court beginning at least as early as 1934 * * * has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." (*Lincoln Federated Labor Union v. Northwestern Iron and Metal Company, et al.*, 335 U.S. 525, sustaining state laws which outlawed the union shop.) As was there made plain, the modern interpretation of the due process clauses of the Fifth and Fourteenth Amendments is applicable regardless of whether organized workers or their adversaries invoke the prior, discredited doctrine. See *id.*, at 537.

CONCLUSION

For the foregoing reasons and those stated in the Brief for Appellees, the judgment of the Court of Appeals of Michigan should be affirmed:

Respectfully submitted,

STEPHEN I. SCHLOSSBERG

1125 Fifteenth Street, N.W.
Washington, D.C. 20005

JOHN A. FILLION

8000 East Jefferson Ave.
Detroit, Mich. 48214
Attorneys for UAW

J. ALBERT WOLL

ROBERT C. MAYER

815 Fifteenth Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD

815 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for AFL-CIO

SEP 14 1976

WILLIAM ROBAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-1153

D. LOUIS ABOOD, ET AL., *Appellants*,
v.
DETROIT BOARD OF EDUCATION, ET AL., *Appellees*.

CHRISTINE WARCZAK, ET AL., *Appellants*,
v.
DETROIT BOARD OF EDUCATION, ET AL., *Appellees*.

On Appeal from the Michigan
Court of Appeals

**BRIEF AMICUS CURIAE FOR THE
NATIONAL EDUCATION ASSOCIATION**

ROBERT H. CHANIN
DAVID RUBIN
STEPHEN M. NASSAU
ELISE T. SNYDER
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae

TABLE OF CONTENTS

| | Page |
|---|------|
| INTEREST OF AMICUS CURIAE | 2 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 3 |
| ARGUMENT | 7 |
| I. THE CHALLENGED AGENCY SHOP ARRANGEMENT DOES NOT VIOLATE APPELLANTS' FIRST AMEND- MENT RIGHTS | 7 |
| A. Although Union Shop And Agency Shop Ar- rangements In Private Employment Are Im- bued With The Requisite "State Action" To Trigger Constitutional Limitations, They Do Not Violate First Amendment Rights | 7 |
| 1. Such Union Security Arrangements Con- stitute An Important Element of National Labor Policy | 7 |
| 2. Such Union Security Arrangements Have Been Consistently Held Not, On Their Face, To Infringe Upon Protected Rights of Association or Speech | 16 |
| 3. Assuming Arguendo That Protected Rights Of Association Or Speech Are In- fringed By A Private Sector Union Se- curity Arrangement, Such Infringement Is Justified By A Compelling Govern- mental Interest | 25 |
| B. Private Sector Precedents Sustaining The Constitutionality Of Union Shop And Agen- cy Shop Arrangements Are Controlling Here | 30 |
| 1. The Structure And Purposes Of The Mich- igan Statute And Other State Statutes Authorizing Union Security Agreements In Public Employment Parallel Those Of The National Labor Relations Act And The Railway Labor Act | 30 |

| | Page |
|--|------|
| 2. The Considerations Validating Union Security Arrangements In The Private Sector Are Equally Applicable Here | 38 |
| (a) The Effect On The Constitutional Rights Of Nonmember Employees—If Any—Is Identical | 38 |
| (b) The State Interest Is As Compelling As The Congressional Interest | 39 |
| (c) The Private Sector Precedents Are Not Distinguishable On “State Action” Grounds | 47 |
| (d) The Activities of Public Employee Unions Are No More “Political” In Any Constitutionally Significant Sense Than Those Of Private Sector Unions | 49 |
| (1) The Fact That Public Employee Unions Must Deal With Government As The Employer Does Not Make Their Collective Bargaining Activities “Political” In The Sense Used By This Court In <i>Street and Allen</i> | 50 |
| (2) The Fact That Public Employee Unions Are Involved In The Political Process Does Not Distinguish Them From Private Sector Unions | 54 |
| II. THE COURT BELOW IN ESSENCE SEVERED THE APPLICATION OF THE MICHIGAN STATUTE WHICH IT DEEMED UNCONSTITUTIONAL, AND THAT ACTION IS NOT SUBJECT TO REVIEW BY THIS COURT | 57 |
| CONCLUSION | 61 |

| CASES: | Page |
|---|--------------------|
| <i>Association of Capital Powerhouse Engineers v. Division of Bldgs. & Grounds</i> , 92 LRRM 2748 (Wash. Super. Ct., March 26, 1976) | 38 |
| <i>Bauch v. City of New York</i> , 21 N.Y.2d 599, 237 N.E.2d 211, cert. denied, 393 U.S. 834 (1968) | 41 |
| <i>Bell v. State of Maryland</i> , 378 U.S. 226 (1964) | 61 |
| <i>Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen</i> , 373 U.S. 113 (1963) | 16, 23, 24, 52, 57 |
| <i>Buckley v. American Federation of Television and Radio Artists</i> , 496 F.2d 305 (2d Cir. 1974), cert. denied, 419 U.S. 1094 (1974) | 15, 16 |
| <i>Buckley v. Valeo</i> , — U.S. —, 96 S.Ct. 612 (1976) ... | 27 |
| <i>Champlin Rfg. Co. v. Corporations Commission of Oklahoma</i> , 286 U.S. 210 (1932) | 59 |
| <i>City of Warren</i> , 1966 MERC Lab. Op. 25 | 31 |
| <i>Clark County Classroom Teachers Assn. v. Clark County School District</i> , 532 P.2d 1032 (Nev. S.Ct. 1975) | 41 |
| <i>Connecticut State Federation of Teachers v. Board of Education Members</i> , No. 75-7436 (2d Cir. May, 1976) | 40 |
| <i>Cooper v. General Dynamics Convair Aerospace Div.</i> , 533 F.2d 163 (5th Cir. 1976) | 27, 28, 49 |
| <i>Dal-Tex Optical Co.</i> , 137 NLRB 1782 (1962) | 31 |
| <i>Detroit Police Officers Association v. Detroit</i> , 391 Mich. 44, 214 N.W.2d 803 (1974) | 31 |
| <i>Dorchy v. State of Kansas</i> , 264 U.S. 286 (1924) | 61 |
| <i>Eastern Michigan University Regents v. Eastern Michigan University Professors</i> , 46 Mich. App. 534, 208 N.W.2d 641 (1973) | 31 |
| <i>Edgewood Federation of Teachers, Local No. 3158 v. Edgewood Independent School District</i> , Civ. No. SA-74-CA-39 (W.D. Tex. May 7, 1975) | 41 |

| | Page |
|---|--------------------|
| <i>Emporium Capwell Co. v. Western Addition Community Organization</i> , 420 U.S. 50 (1975) 9, 10, 29, 31, 32 | |
| <i>Federation of Delaware Teachers v. DeLaWarr Board of Education</i> , 335 F.Supp. 385 (D. Del. 1971) ... | 41 |
| <i>Ford Motor Co. v. Huffman</i> , 345 U.S. 330 (1953) | 10 |
| <i>Gray v. Gulf, Mobile & Ohio Railroad Co.</i> , 429 F.2d 1064 (5th Cir. 1970), <i>cert. denied</i> , 400 U.S. 1001 (1971) | 22, 26, 28, 39 |
| <i>Hammond v. United Papermakers and Paperworkers Union, AFL-CIO</i> , 462 F.2d 174 (6th Cir. 1972), <i>cert. denied</i> , 409 U.S. 1028 (1972) | 27, 48 |
| <i>Harper Woods Public Schools</i> , 1971 MERC Lab. Op. 658 | 31 |
| <i>Haukedahl v. School District No. 108</i> , No. 75 C 3641 (N.D. Ill. May 19, 1976) | 41 |
| <i>Humphrey v. Moore</i> , 375 U.S. 335 (1964) | 10, 32 |
| <i>International Association of Machinists v. Street</i> , 367 U.S. 740 (1961) | <i>passim</i> |
| <i>J. I. Case v. NLRB</i> , 321 U.S. 332 (1944) | 9 |
| <i>Jackson v. Metropolitan Edison Company</i> , 419 U.S. 345 (1974) | 48 |
| <i>Linscott v. Millers Falls Company</i> , 440 F.2d 14 (1st Cir. 1971), <i>cert. denied</i> , 404 U.S. 872 (1971) .. | 26, 28, 46, 48 |
| <i>Local 836, Council 77, AFSCME</i> , 1976 MERC Lab. Op. 84 | 32 |
| <i>Local 858, AFT v. Denver School District No. 1</i> , 314 F.Supp. 1069 (D. Colo. 1970) | 41, 42 |
| <i>Lathrop v. Donohue</i> , 367 U.S. 820, 81 S.Ct. 1826 (1961) | 20, 21, 22, 39, 40 |
| <i>Medo Photo Supply Corp. v. NLRB</i> , 321 U.S. 678 (1944) | 9 |
| <i>Mellon v. Board of Education</i> , 22 Mich. App. 218 (1970) | 31 |
| <i>Melvindale-Northern Fitzgerald Board of Education</i> , 1967 MERC Lab. Op. 1967 | 31 |

| | Page |
|---|---------------|
| <i>Memphis American Federation of Teachers, Local 2033 v. Board of Education</i> , 534 F.2d 699 (6th Cir. 1976) | 41 |
| <i>MERC v. Detroit Symphony Orchestra</i> , 393 Mich. 116, 223 N.W.2d 283 (1974) | 30 |
| <i>MERC v. Reeths-Puffer School District</i> , 391 Mich. 253, 215 N.W.2d 672 (1974) | 30 |
| <i>Michigan City (Indiana) Federation of Teachers, Local 399 v. Michigan City Area Schools</i> , 499 F.2d 115 (7th Cir. 1974) | 41 |
| <i>Milwaukee Federation of Teachers v. WERC</i> , 92 LRRM 2836 (Wis. Cir. Ct. April 12, 1976) | 37 |
| <i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972) | 49 |
| <i>Moritz v. Commissioner of Internal Revenue</i> , 469 F.2d 466 (10th Cir. 1972) | 60 |
| <i>Nixon v. Herndon</i> , 273 U.S. 536 (1927) | 51 |
| <i>NLRB v. Allis-Chalmers Mfg. Co.</i> , 388 U.S. 175 (1967) 8, 9 | |
| <i>NLRB v. General Motors</i> , 373 U.S. 734 (1963) .. | 12, 16, 19 |
| <i>NLRB v. Jones & Laughlin Steel Corp.</i> , 301 U.S. 1 (1937) | 9 |
| <i>Oakland County Sheriffs</i> , 1968 MERC Lab. Op. 1 ... | 32, 38 |
| <i>Oil, Chemical & Atomic Workers, International Union, AFL-CIO v. Mobile Oil Corp.</i> , — U.S. — 96 S.Ct. 2140 (1976) | 49 |
| <i>Railway Employees' Department v. Hanson</i> , 351 U.S. 225 (1956) | <i>passim</i> |
| <i>Reid v. UAW</i> , 479 F.2d 517 (10th Cir. 1973), <i>cert. denied</i> , 414 U.S. 1076 (1973) | 24 |
| <i>Retail Clerks International Association v. Schermerhorn</i> , 373 U.S. 746 (1963) | 12 |
| <i>Robbinsdale Education Association v. Robbinsdale Federation of Teachers</i> , 239 N.W.2d 437 (Minn. S.Ct. 1976), <i>appeal docketed, sub nom., Threlkeld v. Robbinsdale Federation of Teachers</i> , 44 U.S.L.W. 3677 (U.S. May 7, 1976) (No. 75-1628) | 36 |

| | Page |
|---|------------|
| <i>Rockwell v. Crestwood School District</i> , 393 Mich. 616, 227 N.W.2d 736 (1975) | 30 |
| <i>Seay v. McDonnell Douglas</i> , 427 F.2d 996 (9th Cir. 1970) | 48 |
| <i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942) | 59, 61 |
| <i>Smigel v. Southgate Community Schools</i> , 70 LRRM 2042 (Mich. Cir. Ct. 1970), <i>modified</i> , 24 Mich. App. 179, 180 N.W.2d 215 (1970), <i>rev'd</i> , 338 Mich. 531, 202 N.W.2d 305 (1972) | 33, 34 |
| <i>Steele v. Louisville & N. R. Co.</i> , 323 U.S. 192 (1944) .. | 8, 10 |
| <i>Syres v. Oil Workers International Union</i> , 350 U.S. 892 (1955) | 10 |
| <i>Tilton v. Richardson</i> , 403 U.S. 672 (1971) | 58 |
| <i>Town of North Kingston v. North Kingston Teachers Association</i> , 110 R.I. 698, 287 A.2d 342 (1972) | 37 |
| <i>Tremblay v. Berlin Police Union</i> , 108 N.H. 416, 237 A.2d 668 (1968) | 37 |
| <i>Tunstall v. Brotherhood of Locomotive Firemen</i> , 323 U.S. 210 (1944) | 10 |
| <i>United States v. Jackson</i> , 390 U.S. 570 (1968) | 58, 60 |
| <i>United States v. International United Auto, etc., Work- ers</i> , 352 U.S. 567 (1957) | 56 |
| <i>Vaca v. Sipes</i> , 386 U.S. 171 (1967) | 10, 32 |
| <i>Virginia Railway Co. v. System Federation No. 40</i> , 300 U.S. 515 (1937) | 9 |
| <i>Wayne County Community College</i> , 1976 MERC Lab. Op. 347 | 32 |
| <i>Welsh v. United States</i> , 398 U.S. 333 (1970) | 59 |
| <i>Willow Run Public Schools</i> , 1968 MERC Lab. Op. 396 | 31 |
| <i>Yott v. North American Rockwell Corp.</i> , 501 F.2d 398 (9th Cir. 1974) | 27, 28, 49 |

CONSTITUTIONS, STATUTES AND EXECUTIVE ORDERS:

Constitution of the United States

Amendment I *passim*

Amendment X

Amendment XIV *passim*

United States Statutes

29 U.S.C. § 151 8

29 U.S.C. § 158(a)(3) 11

29 U.S.C. § 159(a) 11

29 U.S.C. § 164(b) 12, 26

45 U.S.C. § 151 8

45 U.S.C. § 152 11, 12

Executive Orders

10988 (1962) 32

11491 (1969) 32

Alaska Statutes

Alaska Stats. 23.40.110b(2) 35

California Statutes

Cal. Gov't Code 3546 45

Connecticut Statutes

Conn. Gen. Stat. Ann. 31-105(5) 45

Hawaii Statutes

Hawaii Rev. Stat. 89-4 35

Massachusetts Statutes

Mass. Gen. Laws Ch. 335 §§ 1-2 (1969) 35, 45

| | Page |
|---|--------|
| Michigan Statutes | |
| M.C.L.A. § 423.201 <i>et seq.</i> | 30 |
| M.C.L.A. § 432.210 | 34, 38 |
| M.C.L.A. § 423.211 | 31 |
| M.C.L.A. § 8.5 | 58 |
| Minnesota Statutes | |
| Minn. Stat. Ann. § 179.65(2) | 35 |
| Wisconsin Statutes | |
| Wis. Stats. § 111.70(1)(h) | 36 |
| Wis. Stats. § 111.70(3) | 36 |
| MISCELLANEOUS: | |
| 96 CONG. REC. 16279 (1951) | 12 |
| 96 CONG. REC. 17050 (1951) | 13 |
| 96 CONG. REC. 17057 (1951) | |
| 96 CONG. REC. 17058 (1951) | 14, 15 |
| Government Employees Relations Report, Reference File 51:501 (BNA 1975) | 32, 44 |
| Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. (1934) | 8 |
| Hearings on S. 3295 Before the Subcommittee on Rail- way Labor Act Amendments of the Senate Com- mittee on Labor and Public Welfare, 81st Cong., 2d Sess. (1952) | 14 |
| Lane, "Analysis of the Federal Law Governing Polit- ical Expenditures by Labor Unions," 9 LABOR LAW JOURNAL 725 (1958) | 56 |

| | Page |
|--|------|
| <i>Study Committee Report and Recommendation, August 1969, Which Led to the Issuance of Executive Or- der 11491, at 65, in Labor-Management Relations in the Federal Service (U.S. Federal Labor Relations Council 1975)</i> | 32 |
| Weyand, "Majority Role in Collective Bargaining," 45 COLUM. L.REV. 556 (1945) | 8 |

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 75-1153

D. LOUIS ABOOD, ET AL., *Appellants*,

v.

DETROIT BOARD OF EDUCATION, ET AL., *Appellees*.

CHRISTINE WARCZAK, ET AL., *Appellants*,

v.

DETROIT BOARD OF EDUCATION, ET AL., *Appellees*.

On Appeal from the Michigan
Court of Appeals

**BRIEF AMICUS CURIAE FOR THE
NATIONAL EDUCATION ASSOCIATION**

This brief, Amicus Curiae, is filed by the National Education Association (NEA) with the consent of the parties, pursuant to Rule 42 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The NEA is an independent, voluntary organization open to persons who are actively engaged in the profession of teaching or other educational work and to all other persons interested in advancing the cause of education. It presently has more than one million, eight hundred thousand members employed in public school systems throughout the United States, including more than 90,000 in Michigan.

A primary objective of NEA and its state and local affiliates is to effectuate improvements in the terms and conditions of employment of teachers, and each of these organizations is committed to the view that this can be done most effectively when employees are organized to deal collectively with their employers. When an organization has been chosen by the majority of employees in a bargaining unit to represent all members of the unit in dealings with their employer regarding terms and conditions of employment, we believe that the costs of such representation, and of policing the collective agreement, should be borne by all employees without regard to membership in the organization which has secured such improvements.

Where permitted by state law, many NEA affiliates have negotiated various types of union security provisions, including agency shop. In at least two states where NEA affiliates bargain as majority representatives, agency shop fees are mandated by state law.

In Michigan, many NEA affiliates engage in collective bargaining with school boards and have negotiated agency shop provisions pursuant to the Michigan Public Employment Relations Act. Although the Detroit Federation of Teachers, which negotiated the

agency shop agreement in issue here, is not an affiliate of NEA, on behalf of the NEA members in Michigan as well as the NEA members in other states which sanction the negotiation of union security provisions, we support the constitutionality of the Michigan statute and the challenged agency shop arrangement.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question in this case is whether a state, pursuant to an overall labor relations structure patterned after the national labor laws, may constitutionally authorize, in the public sector, the negotiation of the same type of union security agreements which have been negotiated with congressional encouragement and support in the private sector—agreements which constitute an important element of the national labor policy embodied in the Railway Labor Act and the National Labor Relations Act, and which have been upheld by this Court for a generation.

I.

Congress, by authorizing the negotiation of union security provisions in the private sector, sought to encourage basic fairness among employees in the bargaining unit. Congress felt that employees whose bargaining agent negotiated collective agreements, policed such agreements, and processed grievances under them for all members of the bargaining unit—members and non-members alike—should share equally in the cost of such services just as a voter who voted for the losing party must nevertheless pay taxes for the government services in which he shares. By authorizing the elimination of “free riders,” Congress also sought to encourage labor peace and stability. Moreover, this Court

and other courts have recognized that to strike down such union security provisions would undermine the basic congressional policy calling for effective collective bargaining by depriving the exclusive representative of the necessary resources to adequately negotiate, police, and administer the collective agreement.

Although union shop and agency shop arrangements in private employment have been held by this Court to be imbued with the requisite governmental action to bring the requirements of the First Amendment into play, the Court has repeatedly held that such arrangements do not *per se* violate the First Amendment rights of employees who are required to contribute financial support to the bargaining agent.

Such union shop and agency shop arrangements do not violate freedom of association since employees from whom fees are exacted are not required to associate with anyone. Nor does such a requirement on its face infringe upon freedom of expression, since the requirement does not obligate employees to subscribe to any particular doctrine.

If a union shop or agency shop provision, insofar as it requires all employees in the bargaining unit to contribute to the cost of bargaining, policing and administering the collective agreement, infringes at all upon First Amendment rights, the infringement is marginal and outweighed by the important and substantial interests of Congress in insuring basic equity, labor peace and stability, and effective collective bargaining.

A different result might be reached if the exaction of fees were to be used to support political causes to which the employee is opposed. This Court has construed the Railway Labor Act as not permitting such

expenditures and has identified appropriate remedies for those objecting to such use. Nevertheless, the Court has consistently upheld the constitutionality of the basic union security provisions themselves.

In managing its own internal affairs, Michigan has adopted a labor relations structure which parallels the structure established by Congress for the private sector and which was motivated by similar considerations. Because of this comparability, the Michigan agency shop arrangement raises no unique constitutional issues and the private sector precedents are controlling.

Appellants argue that there can be no compelling state interest here because most states do not authorize agency shop arrangements in the public sector. Agency shop, however, is an integral part of the statutory scheme that Michigan has developed to deal with public employment labor relations. Michigan concluded that in order to achieve labor stability and effectively deliver governmental services, it should establish a system of collective bargaining and exclusive recognition, impose a duty of fair representation, and, to offset the resulting costs, authorize the parties at the bargaining table to negotiate agency shop provisions. The constitutionality of the Michigan scheme cannot be made to depend upon whether a nose count of its sister states, many with entirely different labor relations structures, currently approve of its action.

Appellants also argue that Michigan cannot have a compelling interest because it, like Congress, leaves the decision whether to negotiate a union security agreement to the parties. But the states, like Congress, must make many compromises of both a policy and political nature in enacting labor relations statutes.

Its accommodation to local realities on the agency shop question was one of those compromises, and the wisdom of that compromise is a "question of . . . policy with which the judiciary has no concern." *Railway Employees' Department v. Hanson*, 351 U.S. 225, 234 (1956).

In *Hanson*, this Court sustained a union security provision negotiated pursuant to the Railway Labor Act. The appellants argue that because *Hanson* involved private parties, there was no "state action" and no need to put the issue of union security to the litmus test of the Constitution, and, hence, *Hanson* is not controlling. But this Court clearly and unanimously found that there *was* sufficient governmental action to trigger constitutional limitations, and proceeded to uphold the validity of the challenged union security arrangement.

Appellants further argue that public employee unions are more "political" than private sector unions. Insofar as appellants contend that the bargaining table functions of a public employee union are "political" because government is the employer, the argument lacks merit. The "political" expenditures which this Court deemed unauthorized by Congress have been specifically distinguished by this Court from expenditures germane to collective bargaining. Moreover, the "political" expenditures which have caused concern to some members of this Court have been expenditures going to matters of conscience and belief and the political electoral process. Compelled financing of the collective bargaining activities of a public employee union does not interfere with the "conscience and beliefs" of the employees it represents any more than does the exaction of fees to sup-

port the bargaining activities of a private sector union. To the extent that appellants argue that public employee unions are "political" because they deal extensively with government in contexts other than collective bargaining, their argument fails because such activities do not differ significantly from the activities of unions in the private sector where union security arrangements have been upheld by this Court.

II.

In ruling that unions may not spend exacted agency shop monies for "political" causes over the objections of dissenting employees, the Michigan Court of Appeals in effect severed the application of the statute which it found to be unconstitutional from its constitutional aspect of providing financing for collective bargaining activities. Determinations as to the severability of state statutes are matters of state law for the courts of the state, and accordingly the Michigan Court of Appeals' action is conclusive upon this Court. The decision of the court below provided appellants with effective relief by declaring that fees exacted from appellants could not be used for "political" causes over their objection.

ARGUMENT

- I. THE CHALLENGED AGENCY SHOP ARRANGEMENT DOES NOT VIOLATE APPELLANTS' FIRST AMENDMENT RIGHTS.
 - A. Although Union Shop and Agency Shop Arrangements In Private Employment Are Imbued With The Requisite "State Action" To Trigger Constitutional Limitations, They Do Not Violate First Amendment Rights.
 1. SUCH UNION SECURITY ARRANGEMENTS CONSTITUTE AN IMPORTANT ELEMENT OF NATIONAL LABOR POLICY.

In the early nineteen-thirties, Congress sought to minimize labor unrest in order to insure the unim-

peded flow of commerce. It was the judgment of Congress that this goal could be realized most effectively if it guaranteed that employees would have the right to organize into unions and to bargain collectively with their employers. Accordingly, in 1934, Congress substantially amended the Railway Labor Act, 45 U.S.C. 151, and in 1935 enacted the National Labor Relations Act, 29 U.S.C. 151. In both of these measures Congress provided that the labor organization which was to function as the bargaining representative for a unit of employees was to be elected by majority vote of all of the employees in that unit and that once such a selection was made, the union's representative role was to be exclusive.¹ In rejecting notions of plural or proportional representation in favor of the majoritarian principle, Congress undoubtedly was influenced by political analogies. See *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.") *Accord*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).²

¹ See Weyand, "Majority Rule in Collective Bargaining," 45 *Colum. L. Rev.* 556 (1945).

² Congressional policy was prefigured by the testimony of Joseph Eastman, Federal Coordinator of Transportation, speaking in support of the majority rule provisions in the 1934 amendments to the Railway Labor Act:

"I think that is the principle that we follow throughout this country in all of our government activities. If a majority of the people, even a plurality, select Congress, that is the kind of Congress they get and that sits until the next election, when those in the minority have a chance to convert the others to their way of thinking. The same with labor unions." Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73rd Cong., 2d Sess. at 33-34 (1934).

This Court has repeatedly recognized the validity of the principle of exclusive representation. See, e.g., *NLRB v. Allis-Chalmers Mfg. Co.*, *supra*; *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J. I. Case v. NLRB*, 321 U.S. 332 (1944.); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). Only recently the Court refused to permit an exception to the principle of exclusive representation even where elimination of racial discrimination—a matter of "highest priority"—was involved. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975). Holding that the protection given concerted activities by Section 7 of the National Labor Relations Act did not extend to two employees who tried to pressure their employer to bargain with them rather than the majority representative about problems of racial discrimination, the Court in *Emporium Capwell* indicated that such bargaining would endanger the interests of both the employees and the employer, and that an employer could have "strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination." 420 U.S. at 70. The Court explained its rationale as follows:

"An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accommodate each group's demands . . . could only set one group against the other even if it is not the employer's intention to divide and overcome them. . . . With each group able to

enforce its conflicting demands—the incumbent employees by resort to contractual processes and the minority employees by economic coercion—the probability of strife and deadlock, is high. . . .” *Id.* at 67-68.

With exclusive authority conferred upon the majority union to represent all employees in the unit, its members and nonmembers alike, comes the correlative obligation fairly to represent them all. Although not specifically articulated by Congress, the Court found such an obligation to be implicit in the national labor policy, both with respect to negotiations with the employer, *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Steele v. Louisville & N.R. Co.*, *supra*; and the administration of the collective bargaining agreement, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964). In announcing the doctrine, this Court referred to the political model. After considering the collective bargaining system which Congress had chosen to promote industrial stability in the railroad industry, the Court concluded:

“[T]he Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom its legislates.” *Steel v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).³

³ As this Court emphasized in *Emporium Capwell*, *supra*, at 64, Congress sought to accommodate the interests of minority employees in other ways: by assuring that they are in a “unit appropriate for

Collective bargaining, especially in its contemporary dimensions, is time consuming and costly. It requires bargaining agents or their parent organizations to maintain research departments, hire legal and other experts, amass economic information and formulate and document positions which can both satisfy their constituency and be reasonably persuasive to employers at the bargaining table. The policing of collective bargaining agreements after they have been negotiated and the processing of grievances under them also involves considerable time and expense, and, by virtue of the duty of fair representation, the exclusive representative must process grievances on behalf of all members of the bargaining unit, its members and nonmembers alike.

Mindful of the costs involved in negotiating and administering collective agreements, Congress expressly authorized parties at the bargaining table to require that those who reap the benefit of a union’s representation contribute to its cost. Thus, both the National Labor Relations Act and the Railway Labor Act, as amended, allow employers and exclusive representatives to agree that as a condition of continued employment, all employees in the unit must become members of the union within a specified period after their hiring. See 29 U.S.C. 158(a)(3); 45 U.S.C. 152, Eleventh. This express authorization for the union

the purposes of collective bargaining” with sufficient commonality of interests with their fellow unit members to avoid distinctively differing employment concerns; by guaranteeing through the Landrum-Griffin Act amendments of 1959, that minority voices within unions have a fair chance to be heard and to influence the thinking of the group; and by entitling individual employees to “present grievances to their employer” under Section 9(a) of the NLRA, 29 U.S.C. 159(a).

shop has been held to cover union security arrangements which, while requiring all employees in the unit to contribute to the cost of negotiating and administering collective agreements, do not require actual membership in the union. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).⁴

Members of both Houses of Congress articulated their belief that the amendments to the Railway Labor Act would provide basic fairness among employees in the bargaining unit. Senator Hill was a member of the Committee on Labor and Public Welfare who, along with Senator Taft, drafted the amendments to S. 3295, which ultimately became the law. After these amendments, the bill received the unanimous recommendation of the Committee. Senator Hill said during the debates:

"There can be an honest disagreement as to whether individuals favor labor unions. The question in this instance is whether those who enjoy the fruits and the benefits of the unions should make a fair contribution to the support of the unions." 96 CONG. REC. 16279.

Similarly, Representative Wolverton, a member and former chairman of the House Committee on Interstate and Foreign Commerce, which had recom-

⁴ The Railway Labor Act authorizes such agreements notwithstanding "any other statute or law of . . . any state." 45 U.S.C. 152, Eleventh. The National Labor Relations Act, however, does not authorize "the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or Territorial law." 29 U.S.C. 164(b). This provision has been held to encompass agency shop agreements as well as union shop agreements. *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963).

mended support of an almost identical House bill, said in urging passage of S. 3295:

"One of the compelling reasons that in my opinion justifies the union-shop provision grows out of the fact that under the act whatever benefits result from the collective bargaining of the employees' representatives is shared by all employees of the particular craft or class. The representative therefore actually represents all the employees of such craft or class whether they be members or not of the union. To me it seems simple justice to expect, and, if necessary, require all employees who stand to benefit from the collective bargaining to belong to the union that acts for them, and in their behalf. Otherwise, employees who did not belong to the union share equally with those who do belong, the same benefits, and without assuming any of the responsibilities incident to membership. The mere statement of this fact seems to me to present an unanswerable argument in favor of what this bill seeks to do." 96 CONG. REC. 17050.

Drawing upon the political analogy, Congress recognized that just as all who benefit from the services provided by government should help defray the cost regardless of whether they voted for the party in power, comparable equitable principles justified a provision insuring that all who benefit from the services of a union chosen as the bargaining representative by a majority should contribute to the expense—in short, that in a system of industrial democracy, as in a political democracy, there should be no representation without taxation. For example, Senator Lehman, a member of the subcommittee which considered the amendments to the Railway Labor Act authorizing union security, responded to a witness during Senate hearings in this way:

"But there is no doubt that while no man is compelled to join a political party, all citizens have equal duties in order to enjoy the benefits of citizenship.

"Every man, whether he is a Democrat, a Republican, or some other party, has to pay taxes; he has to do jury duty, he has to bear arms in defense of his country.

....

"He has got these various obligations or else he does not obtain or is not entitled to the benefits that come from citizenship.

"Now, the men working on the railroad who do not belong to the brotherhoods or to the unions, they do share in all the benefits without accepting any of the responsibilities so far as I can see."
Hearings on S. 3295 before the Subcommittee on Railway Labor Act Amendments of the Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess., at 169-70.

Representative Linehan, a member of the House Committee which had given considerable time and attention to bills providing for union security, stated in debate:

"'Free riders'—those who seek to get something for nothing are resented in every walk of life, and justly so. We all believe no man should shirk his responsibility. None among us will deny that all who benefit from the services provided by organized society, through government, should help pay the cost of government. Why should not the same principle apply to workers who secure the benefits of trade unionism?"

....

"This measure is the very essence of democracy."
96 CONG. REC. 17058

Congress also believed that union security provisions would enhance labor stability. Representative Linehan went on to say during the debate:

"This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst—the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved.

"Such a situation creates friction. It makes for hard feelings. It lowers morale. It affects output and productivity. Under the union shop, workers will be pulling together. Each man will be bearing his proper share of the load. This should undoubtedly result in improved productivity and greater harmony which will be equally beneficial to the employees, the management, and the public." 96 *Cong. Rec.* 17058.

Moreover, as this Court has recognized in a case arising under the Railway Labor Act, such union security agreements promote "the basic Congressional policy" calling "for self-adjustments between effective carrier organizations and *effective* labor organizations." *International Association of Machinists v. Street*, 367 U.S. 740, 772 (1961) (emphasis added). The purpose of these union security arrangements is to "enable . . . [collective bargaining] agents to fulfill their statutory responsibility to represent all the employees while collectively bargaining with the employer . . ." *Buckley v. AFTRA*, 496 F.2d 305, 311 (2d Cir.), *cert. denied*, 419 U.S. 1094 (1974). As the Second Circuit noted in *Buckley*:

"A required tolerance of 'free riders,' i.e., those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden would result not only in flagrant inequity, see e.g., *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-743 . . . (1963); *Radio Officers' Union v. NLRB*, 347 U.S. 17 . . . (1954), but might also eventually seriously undermine the union's ability to perform its bargaining function." *Id.*

In sum, Congress, by authorizing the negotiation of union security provisions, sought to encourage basic fairness among employees in the bargaining unit and enhance labor peace and stability. This Court and other courts have recognized that to strike down such union security provisions would undermine the basic Congressional policy calling for effective collective bargaining by depriving the exclusive representative of resources adequate to negotiate and administer the collective agreement.

2. SUCH UNION SECURITY ARRANGEMENTS HAVE BEEN CONSISTENTLY HELD NOT, ON THEIR FACE, TO INFRINGE UPON PROTECTED RIGHTS OF ASSOCIATION OR SPEECH.

The validity of union security provisions, including the agency shop, has been established by a consistent line of decisions of this Court, notably *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *International Association of Machinists v. Street*, 367 U.S. 704 (1961); *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). With the sanction of these decisions, union shop and agency shop provisions have become commonplace in collective bargaining agreements throughout the country.

In 1956, the constitutionality of a union shop arrangement negotiated pursuant to the Railway Labor Act was challenged in *Railway Employees Department v. Hanson*, 351 U.S. 225 (1956). Under the challenged arrangement all employees of the employing railroad, as a condition of their continued employment, were required to become members of the union within a specified time and thereafter maintain that membership. Several covered employees sued in a Nebraska state court, seeking an injunction restraining enforcement of the arrangement on the ground that it violated the "right to work" provision of the Nebraska Constitution. Defendants contended that the arrangement was authorized by § 2, Eleventh, of the Railway Labor Act, as amended, which provided that notwithstanding the law of "any state", a carrier and a labor organization may make an agreement requiring all employees within a stated time to become a member of the labor organization, provided there is no discrimination against any employee and provided that membership is not denied or terminated

"for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. 152, Eleventh.

The Nebraska trial court issued an injunction and the matter went to the Supreme Court of Nebraska. The latter court concluded that the arrangement violated the plaintiffs' First Amendment rights in that it required them to pay money other than for the cost of union representation. Accordingly, the Nebraska Supreme Court held that there was no valid

federal law to supersede the "right to work" provision of the Nebraska Constitution, and affirmed the decision of the lower court.

Upon review, this Court first considered whether there was sufficient governmental action to trigger constitutional limitations. It answered this question affirmatively:

"The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska nevertheless took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States. . . . The Supreme Court of Nebraska said, 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts could not be enforced therein.' 160 Neb. at page 698, 71 N.W.2d at page 547. We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed [footnote omitted]. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction."

"As already noted, the 1951 amendment, permitting the negotiation of union shop agreements, expressly allows those agreements notwithstand-

ing any law "of any State." § 2, Eleventh [footnote omitted]. A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of a State." 351 U.S. at 231-32.

The Court then turned to the precise nature of the obligation imposed by the union security arrangement in question. Although the arrangement by its terms mandated "membership" in the union, the Court emphasized that:

"The only conditions to union membership authorized by § 2, Eleventh of the Railway Labor Act are the payment of 'periodic dues, initiation fees, and assessments.' The assessments that may be lawfully imposed do not include 'fines and penalties.' The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. The prohibition of 'fines and penalties' precludes the imposition of financial burdens for disciplinary purposes. If 'assessments' are in fact imposed for purposes not germane to collective bargaining, [footnote omitted] a different problem would be presented." *Id.* at 235.

Having found the requisite governmental action to bring constitutional requirements into play, and having reduced the membership obligation to its "financial core" (See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963)), the Court concluded that the challenged arrangement did not on its face infringe upon plaintiffs' First Amendment rights:

"On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. Congress endeavored to safeguard against that possibility by making explicit that no conditions to membership may be imposed except as respects 'periodic dues, initiation fees, and assessments.' If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." 351 U.S. at 238.

Five years later, in *Lathrop v. Donohue*, 367 U.S. 820 (1961), this Court had occasion to rule upon the constitutionality of Wisconsin's requirement that all lawyers in the state join an integrated bar—the type of requirement to which the *Hanson* court had analogized the union shop arrangement. The integrated bar requirement was challenged as an impermissible infringement on freedom of association and speech. Referring back to *Hanson*, the plurality opinion characterized *Hanson* as holding that the compelled payment of money to an exclusive representative did not involve any infringement on associational rights:

"We there held that 2, Eleventh of the Railway Labor Act, 45 U.S.C. 152, 45 U.S.C.A. 152, subd. 11 Eleventh, did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments." 367 U.S. at 842.

Reaffirming *Hanson*, a majority of this Court in *Lathrop* concluded that the integrated bar requirement did not infringe upon the plaintiff's First Amendment rights. In the plurality opinion four Justices stated that "... in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find *any* impingement upon protected rights of association." *Id.* at 843 (emphasis added). A concurring opinion by Mr. Justice Frankfurter, joined by Mr. Justice Harlan, concluded that *Hanson* was controlling, and thus rejected the argument "that compulsory dues-paying membership in an integrated bar infringed 'freedom of association'. . . ." *Id.* at 850. As in *Hanson*, a majority of the Court also concluded that the requirement to join an integrated bar did not constitute a *per se* infringement on freedom of expression.

Under the *Hanson* decision, as further elaborated by the plurality and concurring opinions in *Lathrop*, neither freedom of association nor freedom of expression are infringed by the mere fact that employees in a bargaining unit are required to pay an amount equal to dues to an exclusive representative in order to support the costs of collective bargaining. The soundness of this conclusion becomes clear when

the true nature of the obligation imposed is examined. A member of the bargaining unit who is required to pay an amount equivalent to dues for services rendered by the exclusive bargaining representative is not compelled to associate with anyone. As the Supreme Court of Wisconsin observed in regard to the analogous integrated bar requirement in *Lathrop*:

"The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of \$15 per year." 10 Wis. 2d at 432, 102 N.W.2d at 408, quoted in *Lathrop v. Donohue*, 367 U.S. 820, 828 (1961).

It is equally clear that the requirement does not on its face infringe upon freedom of expression. As the Fifth Circuit noted in *Gray v. Gulf, Mobile & Ohio Railroad Company*, 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), the employee whose fees are exacted "has never been asked to subscribe to any tenets or doctrines of unionism. He has merely been requested to pay his share of the cost of collective bargaining under the union shop agreement."

We recognize, as did the Court in *Hanson*, that a different result might be reached "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment" 351 U.S. at 238. In *International Association of Machinists v. Street*, 367 U.S. 740 (1961), a case involving a union shop negotiated pursuant to the Railway Labor

Act, the Court was confronted with the issue left open in *Hanson*—i.e., whether the power of unions to spend exacted money "is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes." 367 U.S. at 768. The Court answered this question affirmatively, but the decision of the Court based the restriction not on the Constitution but rather on a construction of the Railway Labor Act. See also, *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). In *Street*, four Justices would have reached the constitutional issue. Justices Douglas and Black concluded that the use of compelled money to support ideological causes and electoral politics violated the First Amendment rights of employees. Justices Frankfurter and Harlan, however, concluded that whatever infringement upon the constitutional rights of employees might be involved in the use of exacted money for political causes was more than outweighed by the interests served by union security provisions.

Once the Court determined in *Street* that exacted fees could not be used to finance the "political causes" of the bargaining agent over the objection of dissenting employees, it sought to identify an appropriate remedy for those who objected to such use.⁵ Reaffirming *Hanson's* conclusion that "the union-shop agreement itself is not unlawful," 367 U.S. at 771, the Court concluded that it would not be appropriate to restrain the enforcement of the union shop agreement since this "might well interfere with

⁵ As will be discussed below, the term "political" has many possible meanings. The term is used here only to conform to the language previously used by this Court and not to indicate any acceptance of appellants' overly broad interpretation of the term.

the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry."

Id. at 771. The Court continued:

"The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs 'in the realm of collective bargaining', *Hanson*, 351 U.S. at p. 239, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations." *Id.* at 772 [footnote omitted].

Consistent with the above, the Court ruled that relief should only be granted to those who have made known to the union their objection to use of their funds for "political causes", and it suggested two possible remedies: (1) an injunction against expenditure by the union for "political causes" of a percentage of each complaining employee's payment equal to the percentage of the union's total budget spent for such causes; or (2) restitution to each complaining employee of a percentage of his payment equal to the percentage of the union's total budget which was expended for political purposes despite communication of his objection to the union. *Id.* at 774-75. See also, *Reid v. UAW*, 479 F.2d 517 (10th Cir.), cert. denied, 414 U.S. 1076 (1973). In *Brotherhood of Railway & Steamship Clerks v. Allen*, *supra*, the Court further addressed the remedy issue and encouraged the union litigants in that case to adopt internal procedures through which dissenters could obtain relief from the expenditure of exacted funds for "political causes." 373 U.S. at 122-23.

In sum, union security arrangements in the private sector are imbued with sufficient state action to bring constitutional constraints into play, and constitutional problems may exist if such a union were to use exacted fees for "political causes" over the objection of dissenting employees. This Court, however, has held that neither freedom of association nor freedom of speech are infringed by a requirement that all employees in the bargaining unit be required to contribute to the cost of negotiating, policing, and processing grievances under a collective bargaining agreement.

3. ASSUMING ARGUENDO THAT PROTECTED RIGHTS OF ASSOCIATION OR SPEECH ARE INFRINGED BY A PRIVATE SECTOR UNION SECURITY ARRANGEMENT, SUCH INFRINGEMENT IS JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST.

Since this Court has concluded that union security arrangements in the private sector do not on their face infringe upon First Amendment rights, it has not had occasion to determine whether such arrangements would in any event survive constitutional challenge if subjected to a "compelling governmental interest" test. Several courts of appeals have had occasion to consider this question in cases involving challenges to union security agreements by individuals who claimed that they were required to pay dues to the union contrary to their religious scruples against providing financial support to a union. Although each court ruled that the challenged union security agreement infringed the plaintiff's religious freedom to some extent, each court without exception concluded that the governmental interests involved

were sufficiently important to justify the infringement.

In *Gray v. Gulf, Mobile & Ohio Railroad Co.*, 429 F.2d 1064 (5th Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), for example, the Fifth Circuit considered whether a union security arrangement negotiated pursuant to the Railway Labor Act violated the First Amendment by requiring a person to pay dues in opposition to his religious beliefs. A unanimous court determined that the arrangement did infringe upon religious freedom, but concluded that "[t]he hand of government is not to be stayed where a compelling government interest outweighs the infringement upon First Amendment rights." 429 F.2d at 1072. The court held that the infringement was justified by the congressional policy "that all who benefit from the collective bargaining activities of a railroad union should help to bear the cost of such activities." *Id.* at 1071.

A similar position was taken by the First Circuit in *Linscott v. Miller Falls Company*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), where an employee, discharged for religious refusal to pay fees to a union under a union shop arrangement negotiated pursuant to the National Labor Relations Act, contended that his discharge contravened the First Amendment.⁶ The court concluded that the congressional purpose to further peaceful labor relations and to require a fair sharing of the costs of collective bargaining constituted a compelling state interest

⁶ Since Section 14(b) of the National Labor Relations Act permits a state to outlaw union security arrangements, the defendants sought to distinguish it from *Gray, supra*, on the ground that there was no "state action." The court rejected this contention.

which warranted the infringement on the plaintiff's free exercise of religion. The Sixth and Ninth Circuits have reached similar conclusions. *Yott v. North American Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974); *Hammond v. United Papermakers and Paperworkers Union, AFL-CIO*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972). *Accord, Cooper v. General Dynamics Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976).

In applying the compelling interest test, the nature and degree of the infringement are relevant variables: the less substantial the infringement, the more likely it is to be justified by the state interest. In *Buckley v. Valeo*, — U.S. —, 96 S.Ct. 612 (1976), the Court concluded that congressional limitations on campaign contributions infringed upon First Amendment interests. However, because these infringements were only "marginal," the Court had little difficulty in finding a "sufficiently important interest" to sustain them. *Id.* at 635, 638. Congressional restrictions on campaign expenditures, on the other hand, were characterized as "significantly more severe," *id.* at 635, 636, and thus a more substantial governmental interest was required to sustain their constitutionality:

"The *markedly greater burden* on basic freedoms caused by § 608(e) (1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Id.* at 647. (Emphasis added)

Thus, in determining whether a union security arrangement unconstitutionally infringes upon the First Amendment rights of one compelled to make payment to a union contrary to his religious beliefs, lower

federal courts have assessed "the degree of interference with the religious practice." *Linscott v. Millers Falls Co.*, 440 F.2d at 17; *Yott v. North American Rockwell Corp.*, 501 F.2d at 403. The *Linscott* court, in holding that the governmental interests justified the infringement on First Amendment freedom involved in requiring an employee to contribute financial support to a union contrary to his religious beliefs, took account of the fact that the employee's discharge would not result in "absolute destitution" or total exclusion from gainful employment but only a search for employment in a non-union shop.⁸⁸ 440 F.2d at 18. As a result, the Court concluded "that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is the plaintiff who must suffer. We agree with the Fifth Circuit. *Gray v. Gulf, Mobile & Ohio Railroad Co.*" *Id. Accord*, *Yott v. North American Rockwell Corp.*, 501 F.2d at 403 (concluding that such burdens constituted "minor infringements on First Amendment rights" that were outweighed by the congressional interests supporting union security); *Cooper v. General Dynamics Convair Aerospace Division*, *supra*.

It is, of course, unnecessary for this Court to decide whether a requirement that an employee contribute financial support to a union contrary to his religious beliefs constitutes only a minor infringement on First Amendment rights, for appellants here do not contend that their religious scruples are offended by the

⁸⁸ Presumably the court intended to refer to a search for employment in a shop without a union security requirement.

service fee. Where no religious freedom is invaded, the infringement—if any—is marginal indeed.

In *Street*, Justices Frankfurter and Harlan, dissenting, characterized as "miniscule" even the claim that the expenditure of exacted fees for political causes violated the plaintiffs' free speech rights, since they were "as free to speak as ever." 367 U.S. at 818. Whatever the merits of this view, the infringement of First Amendment rights—if any—inhering in the expenditure of exacted fees to negotiate a collective agreement mutually benefiting all employees in the bargaining unit and to police the agreement and adjust and process grievances arising under it for all such employees—union members and non-union members alike—is slight at best. Under the majority rule principle, the system of exclusive representation is valid even though a particular bargaining unit employee may find the position of the exclusive representative on a matter involving working conditions personally objectionable. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). Accordingly, the requirement that all employees who benefit from the collective bargaining activities of the exclusive representative share in the cost is no more than a mandate for equitable sharing in the implementation of a valid labor relations scheme. If, contrary to our contention and notwithstanding its own long-established precedents, this Court should perceive some infringement upon First Amendment rights in a private sector union security agreement, the balance is properly struck in favor of the legislative policy—long sanctioned by this Court—assuring equity and labor stability.

B. Private Sector Precedents Sustaining The Constitutionality Of Union Shop And Agency Shop Arrangements Are Controlling Here.

1. THE STRUCTURE AND PURPOSES OF THE MICHIGAN STATUTE AND OTHER STATE STATUTES AUTHORIZING UNION SECURITY AGREEMENTS IN PUBLIC EMPLOYMENT PARALLEL THOSE OF THE NATIONAL LABOR RELATIONS ACT AND THE RAILWAY LABOR ACT.

In managing its own internal affairs, Michigan has enacted a statutory scheme which authorizes public employers and the exclusive bargaining representative of their employees to negotiate agency shop arrangements. As we demonstrate below, this scheme is part of an overall labor relations structure which parallels the labor relations structure established by Congress for the private sector and was motivated by similar considerations. Because of this comparability, the Michigan agency shop arrangement raises no unique constitutional issues and the private sector precedents are controlling.

In 1965, the Michigan legislature adopted the Public Employment Relations Act (PERA).⁷ This statute, which was designed to regulate public employer-employee relations in Michigan, was closely modeled after the National Labor Relations Act. Federal decisions under the NLRA have consistently guided the interpretation and application of the PERA. *Rockwell v. Crestwood School District*, 393 Mich. 616, 635-36, 227 N.W.2d 736, 744-45 (1975); *Michigan Employment Relations Commission v. Detroit Symphony Orchestra, Inc.*, 393 Mich. 116, 127, 223 N.W.2d 283, 289 (1974); *Michigan Employment Relations Commission v. Reeths-Puffer School District*, 391 Mich.

⁷ M.C.L.A. 423.201 to 423.216.

253, 260, 215 N.W.2d 672, 675 (1974); *Detroit Police Officers Association v. Detroit*, 391 Mich. 44, 53, 214 N.W.2d 803, 807-808 (1974).

Like federal law, PERA has been interpreted to contemplate the creation of appropriate bargaining units in which all members have a community of interest and commonality of concerns. *Eastern Michigan University Regents v. Eastern Michigan University Professors*, 46 Mich. App. 534, 537, 208 N.W.2d 641, 643 (1973); *City of Warren*, 1966 MERC Lab. Op. 25. Like the NLRB, the Michigan Employment Relations Commission, the administrative agency charged with the responsibility for administering the PERA, has determined the appropriateness of bargaining units when necessary, and has regularly conducted elections to assure fairness and "laboratory conditions" for voters to exercise their free and untrammelled choice of representative. *Willow Run Public Schools*, 1968 MERC Lab. Op. 396, 400; *Harper Woods Public Schools*, 1971 MERC Lab. Op. 658. *Compare Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). When certified by MERC or recognized by the public employer, the labor organization is, pursuant to MCLA 423.211, the "exclusive representative of all the public employees in such unit for purposes of bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment." The principle of exclusivity has been repeatedly affirmed. See, e.g., *Mellon v. Board of Education*, 22 Mich. App. 218, 220 (1970); *Melvindale-Northern Fitzgerald Board of Education*, 1967 MERC Lab. Op. 1967. *Compare Emporium Capwell v. Western Addition Community Organization*, *supra*.⁸

⁸ As of December, 1974, thirty-nine states and the District of

Adopting the standards promulgated by this Court in articulating the national labor policy, the Michigan Employment Relations Commission has imposed upon the exclusive representative the obligation fairly to represent all members of the bargaining unit, irrespective of union membership. *Wayne County Community College*, 1976 MERC Lab.Op. 347; *Local 836, Council 77, AFSCME*, 1976 MERC Lab.Op. 84, 89. Compare *Vaca v. Sipes*, *supra*, and *Humphrey v. Moore*, *supra*.

Following passage of the PERA, Michigan employers and labor organizations began negotiating security provisions of various types. In *Oakland County Sheriff's Department*, 1968 MERC Lab.Op.

Columbia had decided either to allow or require exclusive bargaining for public employees. Government Employees Relations Report, Reference File 51:501 *et seq.* (BNA 1975). Exclusive representation by the majority union in a public sector bargaining unit is designed to achieve the interests recently articulated by this Court in *Emporium Capwell*—the minimization of competing demands which would endanger the interests of both the employees and the employer. 420 U.S. 50 (1975). The federal government initially experimented with recognition of minority unions under Executive Order 10988 (1962), but abandoned it in 1969 in favor of exclusive recognition for the majority representative. Executive Order 11491 (1969). One of the reasons for the change was that government agencies objected to their obligation to deal with minority unions:

“Agency experience also has been largely on the negative side. Federal management officials have found that [minority] recognition is no longer meaningful; that it encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management; and that unions with such recognition lack the strength to contribute substantially to stable labor relations.”

Study Committee Report and Recommendations, August 1969, Which Led to the Issuance of Executive Order 11491, at 65, in Labor-Management Relations in the Federal Service (U.S. Federal Labor Relations Council 1975).

1, the Michigan Employment Relations Commission, following federal guidelines, expressly held that employers and unions were expected to bargain in good faith as to terms and conditions of employment in the public service and that among those mandatory bargaining subjects were union security provisions, including the dues check-off and the agency shop. A majority disfavored the union shop. The decision was not appealed and it set the pattern for further negotiations. Following a number of court tests, in *Smigel v. Southgate Community Schools*, 70 Lab.Rel.Rep. 2042 (Mich. Cir. Ct. 1970), Circuit Judge Foley declined to issue an injunction against enforcement of the agency shop in a suit brought by dissident teachers. Judge Foley found that the agency shop principle

“[H]as become an acceptable method of creating stability in public employee-employer relationships, Board of Education of the Schools of the City of Inkster, 263 GERR F-1 (Sept. 23, 1968); *Oakland County Sheriff's Department*, SLMB Case No. C 66 F-63 (Jan. 8, 1968); 1968 SLMB Labor Opinions 1, 227 GERR F-1 (Jan. 1968); *City of Warren Local No. 1383, International Association of Fire Fighters* (Macomb Circuit Court No. S 67-33111); *Clampitt v. Board of Education of the Warren Consolidated Schools*, 256 GERR E-1.”

He further observed that the agency shop

“[H]as been a bargainable issue in the collective bargaining process for many years and has received recognition as having a stabilizing influence upon employer-employee relations. *Railway Employees Department v. Hanson*, 351 U.S. 225 (1955); *NLRB v. General Motors Corporation*, 373 U.S. 734; *Tremblay v. Berlin Police Union*, 232 GERR D-1 (Feb. 19, 1968).” *Id.*

Even though the Michigan statute at the time did not expressly authorize negotiation of union security agreements, Judge Foley did not find the agency shop discriminatory or otherwise inappropriate. On this point his conclusion was reversed. 338 Mich. 531, 202 N.W. 2d 305 (1972). The Michigan legislature promptly adopted a curative amendment authorizing agreements which require all employees in the bargaining unit to pay "to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." M.C.L.A. 423.210. The Michigan legislature—tracking the concerns of Congress in the national labor laws—declared that

"It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." M.C.L.A. 423.210.

Other state legislatures have reached the same conclusion as the Michigan legislature.⁹ And when confronted with constitutional challenges to state statutes

⁹ Of the approximately 39 states which expressly authorize public sector bargaining, fifteen have included provisions which authorize or mandate the negotiation of one or more types of union security. The legislature of Massachusetts declared that the purpose of providing for agency shop in Boston was to "assure that all the employees of the city of Boston shall be adequately represented by

which authorize union security, courts in these states have identified basic equity, the promotion of effective representation, and labor stability as the justifying interests.

In Minnesota, for example, a collective agreement may require all public employees who are not members of the exclusive representative to pay a "fair share" fee for services rendered by the representative.¹⁰ The Supreme Court of Minnesota, in concluding that the governmental interest in allowing assessment of a "fair share" fee was sufficiently strong to override an individual employee's interest in obtaining a prior hearing on the amount of the fee imposed, focused upon the dangers involved in the inadequate financing of collective bargaining:

"The state's reason for allowing appellant to assess a fair share fee is that a union selected as a bargaining agent by the majority of workers in the appropriate unit must represent all employees in the unit in a nondiscriminatory manner. Unless the nonmember employees in the unit are compelled to contribute to the costs of union representation, they would enjoy the benefits of the bargaining process while the members of the exclusive representative are forced to assume the

their . . . exclusive bargaining agents in bargaining collectively on questions of wages, hours, and other conditions of employment." *Mass. Gen. Laws* ch. 335 § 1 (1969); other states authorize negotiation of a service fee so that the employees will pay their "fair share" or will "reimburse" the collective bargaining agent for "services rendered." See *e.g.*, Alaska Stats. 23.40.110b(2); Hawaii Rev. Stats. 89-4; Minn. Stats. Ann. 179.65(2).

¹⁰ Minn. Stats. Ann. 179.65(2). As amended by Ch. 102, L. 1976, effective March 17, 1976, such a fee may not exceed 85 percent of the regular membership dues.

entire burden of paying for it. In addition, since the members of the exclusive representative may be unable to adequately finance the negotiation and administration of a collective bargaining agreement without such nonmember contributions, the resulting financial instability of the duly elected representative may jeopardize meaningful collective bargaining. [Footnote omitted] See, *Buckley v. American Fed. of Television & Radio Artists*, 496 F.2d 305 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1093 . . . (1974).” *Robbinsdale Education Assn. v. Robbinsdale Federation of Teachers*, 239 N.W.2d 437 (Minn. S.Ct. 1976), *appeal docketed, sub nom., Threlkeld v. Robbinsdale Federation of Teachers*, 44 USLW 3677 (U.S. May 7, 1976) (No. 75-1628)

The court further noted:

“This financial instability might ‘encourag[e] the union to assume an unnecessarily militant attitude toward management in an effort to rally more employees to its financial support. This instability also encourages the employer to be obstinate, in hopes of forcing a favorable agreement from a weak union.’ Blair, *Union Security Agreements in Public Employment*, 60 Cornell L.Rev. 183, 189.” *Id.* at n. 3.

In Wisconsin, an employer and a union may negotiate an agreement requiring all employees in the bargaining unit to “pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members.”¹¹ Such an agreement carries with it a statutory obligation on the part of the employer to deduct the amount of the union’s

¹¹ See Wis. Stats. 111.70(1)(h), 111.70(3).

dues from each employee’s pay. In holding that an employer could not deduct dues for a competing organization, a Wisconsin Circuit Court offered the following rationale for the “fair share” arrangement:

“The majority bargaining representative of the professional teachers, MTEA, must be given the opportunity to make a concerted and concentrated effort towards resolving labor problems concerning all teachers in the Milwaukee public schools whether or not they are members of the union. This may only be accomplished by the elimination of inter-union competition for dues with the unions that have lost the representation election. It is only just and proper that the majority union may obtain money from nonmembers of the union to cover the cost of negotiations which will benefit all the members of the bargaining unit, regardless of union affiliation. If this were not the case, some teachers would have the best of two worlds—they would not pay a cent to the majority union which represents them at the bargaining table, while reaping the benefits of any negotiations which resulted from the work of the majority union. However, by enacting the provision for ‘fair share agreements’ the Legislature has resolved the potential for inter-union conflict over dues by requiring all or any of the employees in the collective bargaining unit to pay to the majority union their proportionate share of the cost of the collective bargaining process. This is definitely within the public interest.” *Milwaukee Federation of Teachers v. WERC*, 92 Lab. Rel. Rep. 2836 at 2841 (Wisc. Cir. Ct., April 12, 1976).

See also, *Town of North Kingston v. North Kingston Teachers Association*, 110 R.I. 698, 287 A.2d 342 (1972); *Tremblay v. Berlin Police Union*, 108 N.H.

416, 237 A.2d 668 (1968); *Association of Capital Powerhouse Engineers v. Division of Bldgs. & Grounds*, 92 Lab. Rel. Rep. 2748 (Wash. Sup. Ct. March 26, 1976); *Oakland County Sheriff's Department*, 1968 MERC Lab. Op. 1.

2. THE CONSIDERATIONS VALIDATING UNION SECURITY ARRANGEMENTS IN THE PRIVATE SECTOR ARE EQUALLY APPLICABLE HERE.

Just as the basic rationale for the Michigan agency shop provision does not differ from the rationale of Congress in authorizing union security provisions, the considerations relevant in assessing the constitutionality of the respective arrangements do not differ in any legally significant sense.

(a) *The Effect On The Constitutional Rights Of Nonmember Employees—If Any—Is Identical.*

First, the effect on the constitutional rights of non-member employees—if any—is identical. The Michigan agency shop arrangement does not require employees to join a union. Rather, it simply requires them to pay “a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.”¹² The extent of an employee's obligation under the Michigan scheme, then, is to render financial support to the bargaining agent. This Court concluded in *Hanson* that such a limited requirement did not impair First Amendment rights. As in the private sector, compelled exaction of a service fee does not bring with it any requirement to associate with union members, to attend

¹² M.C.L.A. 423.210.

union meetings, to vote in union elections, to espouse the cause of unionism. See *Lathrop v. Donohue*, 367 U.S. at 828; *Gray v. Gulf, Mobile & Ohio Railroad Co.*, 429 F.2d at 1072. And the remedy that would be provided under the decision of the court below to any employee who communicates his objection to the use of his money for political causes—restitution to the employee of that portion of his money expended by the union over his objection—adequately meets, just as this Court's remedy did in *Street*, any constitutional problem that may be involved in such expenditure.¹³

(b) *The State Interest Is As Compelling As The Congressional Interest.*

The Michigan legislature and many other state legislatures have concluded that stability in labor relations involving public employees within the state is essential to provide adequate governmental services and that such stability is enhanced by authorizing the

¹³ Appellants suggest that an agency shop arrangement in education differs from an agency shop arrangement in other contexts because the academic freedom of an individual teacher is somehow impaired. It is claimed that as a result of agency shop, even dissenting teachers will ultimately join the union and will “. . . concede control over their careers to the Union.” (Appellants' brief at 158). This will result, it is alleged, in “political and ideological conformity” among the teachers and indoctrination of “impressionable students with the union ‘line’ on difficult and controversial social issues . . .” (Appellants' brief at 163.)

The record, however, contains absolutely no evidence to support these alleged results. When presented with a similar contention in *Hanson*, this Court stated that:

“[I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.” 351 U.S. at 238.

negotiation of union security agreements such as the one in issue here. We submit that the interest of a state in managing its own internal affairs is as important and substantial an interest as that of Congress in insuring the free flow of commerce. See *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961), where Mr. Justice Douglas, in dissent, observed that in *Hanson* the Court had held:

“... that the evil of those who are ‘free riders’ may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its own internal affairs by requiring a union-shop agreement would seem to be as great.”

The establishment of a system of labor relations which seeks to promote stability in state governmental functions is clearly within a state's power. And the interests of the state served by such a system are sufficiently important to warrant some infringement upon First Amendment rights. In a series of decisions involving public employment, federal and state courts have approved the concept of exclusive representation by the majority union. In response to claims that such exclusive representation impairs the minority union members' First Amendment freedoms, the courts have repeatedly ruled that the government's interests in stable labor relations justified any such infringement. *Connecticut State Federation of Teachers v. Board of Education Members*, — F.2d — (No. 75-7436, 2d Cir., May 21, 1976); *Memphis Federation of Teachers*,

Local 2032 v. Board of Education, 534 F.2d 699 (6th Cir. 1976); *Michigan City (Indiana) Federation of Teachers, Local 399 v. Michigan City Area Schools*, 499 F.2d 115 (7th Cir. 1974); *Federation of Delaware Teachers v. DeLaWarr Board of Education*, 335 F. Supp. 385 (D. Del. 1971); *Local 858 of A.F. of T. v. Denver School District No. 1*, 314 F.Supp. 1069 (D. Colo. 1970); *Haukedahl v. School District No. 108*, No. 75 C 3641 (N.D. Ill. May 19, 1976); *Edgewood Federation of Teachers Local 3158 v. Edgewood Independent School District*, Civ. No. SA-74-CA-39 (W.D. Tex. May 7, 1975); *Clark County Classroom Teachers Assn. v. Clark County School District*, 532 P.2d 1032 (Nev. S.Ct. 1975); *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, cert. denied, 393 U.S. 834 (1968).

Several decisions have also approved the practice of granting the exclusive representative for a unit of teachers certain privileges such as access to faculty mailboxes and bulletin boards for distribution of union materials, while denying similar privileges to minority unions. *Connecticut State Federation of Teachers v. Board of Education Members*, *supra*; *Michigan City (Indiana) Federation of Teachers Local 399 v. Michigan City Area Schools*, *supra*; *Federation of Delaware Teachers v. DeLaWarr Board of Education*, *supra*; *Clark County Classroom Teachers Assn. v. Clark County Classroom Teachers Assn. v. Clark County School District*, *supra*; *Haukedahl v. School District No. 108*, *supra*. In addressing a First Amendment challenge to this practice, a Colorado federal district court identified several specific “salutory” aspects of exclusive privileges and concluded:

“[A]ll of these benefits resulting from the grant of exclusive privileges to the elected representa-

tive serve the principal policy of insuring labor peace in public schools. Labor peace means a continuity of ordered collective bargaining between school officials and representatives of the teachers. It means a lowered incidence of labor conflict and strife, thus insuring less interference with the functioning of the public schools as educational institutions.

....

"... We are satisfied that the grant of exclusive privileges to the duly elected bargaining representative of public school teachers by the School District promotes a compelling government interest. The interests of the state above outlined in our discussion of the First Amendment claim are compelling, for labor peace and stability in an area as vital as public education are indisputably a necessity to the attainment of that goal. Inter-union strife within the schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education.

"Thus, we find that the grant of special privileges attacked here satisfies the strictest test for constitutional equal protection. We make this finding although we are not convinced that in fact the classification challenged impairs the exercise of a constitutional right." *Local 858 of A.F. of T. v. Denver School District No. 1*, 314 F.Supp. 1069, 1076-77 (D. Colo. 1970).

Michigan, like Congress, has chosen to promote labor stability not only through the adoption of exclusive representation but also through the authorization of agency shop agreements. Michigan's decision to follow the federal model long sanctioned by this Court and profit by the experience under the national labor laws

should weigh heavily on the scales if—contrary to our contention—any constitutional balancing is required.

Appellants argue, however, that

"[I]f the agency shop were indeed *necessary* to achieve a compelling state interest of some sort in public sector labor relations, we should expect to find it the prevailing rule in most jurisdictions, as well as compulsory rather than (as in Michigan) discretionary with the public employer and union." (Appellant's brief at 128-29).

The argument that there can be no compelling state interest because most states do not authorize agency shop arrangements in the public sector must fail. Agency shop is part and parcel of the statutory scheme Michigan has developed to deal with public employment labor relations. Michigan concluded that in order to achieve labor stability and deliver effective governmental services, it should establish a system of collective bargaining and exclusive recognition, impose a duty of fair representation, and, to offset the resulting costs, authorize the parties at the bargaining table to negotiate agency shop provisions. The constitutionality of the Michigan scheme cannot be made to depend upon whether its sister states currently approve of its action. As this Court has noted, the particular elements contributing to labor peace and stability may be functions of time and place:

"The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the

judiciary." *Railway Employees' Department v. Hanson*, 351 U.S. 225, 234 (1956).

The fact that when Michigan decided to provide a collective bargaining system for public employees the overwhelming majority of the states lacked such a system does not demonstrate that Michigan's decision failed to promote compelling state interests in securing labor stability and promoting effective government services. Nor can it be fairly said that Michigan's subsidiary decision to mandate exclusive recognition failed to promote these basic concerns because other states, at the time of the Michigan decision, had not imposed such a requirement. Surely the constitutional question cannot turn on whether a nose count of the states demonstrates that all or most of the states at a particular point in time have adopted the arrangement in issue. A numerical count of the states in 1960 would have disclosed that only one State—Wisconsin—had established a system of collective bargaining with exclusive recognition in the public sector. Yet, only ten years later, fourteen states had done so.¹⁴ Similarly, in the span of five years, 1969 to 1974, the number of states authorizing agency shop or "fair share" agreements in the public sector jumped from one to thirteen.¹⁵

¹⁴ Summary of State Law, Government Employees Relation Report, Reference File 51:503 (BNA 1970).

¹⁵ In 1969, the Massachusetts legislature required the deduction of an "agency service fee" from the wages of employees serviced by exclusive representatives in the City of Boston, and Suffolk County, *Mass. Gen. Laws* Ch. 335, §§ 1-2 (1969). By December 1, 1974, thirteen states and the District of Columbia made provision for agency shop or "fair share" for some or all public employees. Summary of State Law, Government Employees Relations Report, Reference File 51:501 *et seq.* (BNA 1975). Since 1974, California and Connecticut have authorized agency shop in certain units of

Once Michigan decided to provide for exclusive recognition, and the agency administering the PERA decided that this privilege carried with it the duty of fair representation, Michigan determined that its labor relations scheme required adjustment to offset the costs to the exclusive representative in representing all members of the bargaining unit. That decision was Michigan's to make, and its validity cannot turn upon whether other states, many with entirely different labor relations structures—some which do not provide for exclusivity, some which impose no duty of fair representation, and some which maintain "right to work" laws—have authorized negotiation of agency shop agreements.

With respect to the argument that Michigan cannot have a compelling interest because its statute leaves the decision whether to negotiate a union security agreement to the parties, this is precisely what Congress did in both the Railway Labor Act and the National Labor Relations Act. Congress recognized that the need for union security could not be isolated from the history and pattern of collective bargaining in a local area and, therefore, left the decision whether to adopt union security provisions to the employer and union. That structure was sustained by this Court in *Hanson*. Like Congress, the Michigan legislature has accommodated local realities by leaving the decision whether to negotiate an agency shop agreement to the parties involved.¹⁶

employees. Cal. Gov't. Code 3546; Conn. Gen. Stat. Ann. 31-105(5). Bills to authorize agency shop are presently pending in many other state legislatures.

¹⁶ Cf. *Linscott v. Millers Falls Co.*, *supra*, where the plaintiff contended that because Section 14(b) of the NLRA expressly per-

In adopting its labor relations statute and adjusting it in light of experience, Michigan—like any other state—made many compromises of a policy and political nature. In 1965, it decided to adopt the principle of exclusive recognition and to reject the principle of proportional representation. In 1973, the Michigan Legislature had another choice to make. If it had done nothing in the face of the costs which the bargaining agents were incurring in negotiating agreements as the exclusive representative and in carrying out their duty of fair representation, the state might have jeopardized its entire labor relations structure. At the same time, it might well have foreseen that to mandate agency shop upon unwilling school boards might have created substantial political problems and produced a negative backlash. Michigan, like Congress, compromised by permitting and encouraging, but not requiring, the negotiation of agency shop agreements. The wisdom of that compromise is a “question . . . of policy with which the judiciary has no concern . . .”. *Railway Employees’ Department v. Hanson*, 351 U.S. 225, 234 (1956).

mitted a state to outlaw the union shop by a “right to work” law, there was no compelling governmental interest which justified the infringement on her First Amendment rights by a union security arrangement requiring her to pay money to a union contrary to her religious beliefs. Rejecting this contention, the First Circuit stated (440 F.2d at 18):

“In our opinion the fact that Congress chose to share the decision, and to give the final say to the state, does not deny a federal interest in the case at bar, any more than leaving the final word to the parties themselves denied it in *Hanson*. The federal interest attaches if, and when, such action is believed locally to be appropriate as well as in furtherance of the policies behind the LMRA recited in 29 U.S.C. § 151.” [footnote omitted].

(c) *The Private Sector Precedents Are Not Distinguishable On “State Action” Grounds.*

Appellants assert that since *Hanson* involved the private sector there was no state action and no need for the Court to put the issue of union security under the litmus test of the Constitution. Thus, appellants claim, the *Hanson* decision cannot be considered as controlling precedent on the issues before the Court in the present case.

Appellants’ argument in this regard borders on the frivolous. The question of whether private sector union security arrangements, authorized by federal law, are imbued with such state action as to subject them to constitutional analysis was thoroughly discussed in *Hanson*. This Court agreed with the Supreme Court of Nebraska that the action of Congress in striking down inconsistent “right to work” laws in 17 states was “a necessary part of every union shop contract entered into on the railroads as far as these 17 states are concerned for without it such contracts would not be enforced therein.” 351 U.S. at 231-32. It stated that “if private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded”; that “the federal statute is the source of the power and authority by which any private rights are lost or sacrificed”; that a union shop agreement made pursuant to the Railway Labor Act has “. . . the imprimatur of the federal law upon it . . .”; and that “[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction.” 351 U.S. at 232. Having concluded

ed that state action was involved, this Court then proceeded to apply constitutional standards and clearly and unanimously upheld the validity of the union security arrangement before it.¹⁷

¹⁷ Whether or not *Hanson* resolved the "state action" issue in a manner consistent with constitutional doctrine prevailing today is irrelevant with respect to its precedential value in the present case since in *Hanson*, this Court decided the constitutionality of union security clauses on the premise that state action *was* involved. We submit, however, that although there have been constitutional developments in the area of state action since *Hanson*, on the *Hanson* facts the Court would be obliged to reach the same conclusion. In *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974), this Court was asked to consider whether a practice of a privately owned utility corporation in terminating electric service violated the due process requirements of the Fourteenth Amendment. In analyzing whether there was the requisite governmental action to subject that termination practice to Fourteenth Amendment limitations, the Court found that extensive state regulation of a business does not by itself constitute governmental action. The Court stated:

"[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". 419 U.S. at 351.

In responding to the contention that the state through the Pennsylvania Public Utilities Commission had authorized and approved the termination practice, the Court found that the Commission's approval of the company's practice placed no state "imprimatur" on that policy, since the Commission did not "initiate" or "encourage" the practice. *Id.* at 357 n.17. In the Railway Labor Act, Congress has both "initiated" and "encouraged" union security policy by preempting state laws prohibiting union security agreements. Thus, as this Court concluded in *Hanson*, Congress has placed its "imprimatur" on that policy. 351 U.S. at 231-232.

We submit that this Court would also find today that Congress has placed a federal "imprimatur" on union security arrangements negotiated under the National Labor Relations Act. See *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971), *cert. denied* 404 U.S. 872 (1971); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970); *Hammond v. United Papermakers and Paperworkers Union*, 462 F.2d 174 (6th Cir.), *cert. denied*, 409 U.S. 1028 (1972); *Yott v. North American Rockwell Corporation*, 501 F.2d 398

(d) *The Activities of Public Employee Unions Are No More "Political" in Any Constitutionally Significant Sense Than Those of Private Sector Unions.*

Appellants argue that whatever the precedential nature of *Hanson* regarding the constitutionality of union security clauses in the private sector, the exaction of money to finance the activities of public sector unions must constitute an *a fortiori* abridgement of First Amendment rights due to the "inherently political" nature of those activities. In essence, appellants contend that the fact that government is the employer in public sector collective bargaining means that the bargaining process itself is "political" and thus no money can be compelled to finance such activities with-

(9th Cir. 1974); *Cooper v. General Dynamics Convair Aerospace Division*, 533 F.2d 163 (5th Cir. 1976). Last term this Court considered a challenge to an agency shop agreement negotiated pursuant to the National Labor Relations Act. *Oil, Chemical & Atomic Workers, Etc. v. Mobile Oil Corp.*, — U.S. —, 96 S.Ct. 2140 (1976). At issue was whether the Texas right to work law applied to the agreement in view of the fact that the employees' primary job situs was not in Texas but on the high seas. The Court held that:

"Federal policy favors permitting such agreements unless a State or Territory with a sufficient interest in the relationship expresses a contrary policy via right-to-work laws. It is therefore fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship and that no State's right-to-work laws can apply. 96 S.Ct. at 2147. (Emphasis added)

Moreover, Congress has provided a federal forum for the enforcement of union security agreements negotiated under the National Labor Relations Act. Labor Management Relations Act § 301(a), 29 U.S.C. 185(a). Such federal sanctions themselves constitute the requisite governmental action to trigger constitutional restraints. Compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-179 (1972).

out infringing individual constitutional rights. Additionally, appellants assert that the requirement that public employees pay agency shop fees to their bargaining agent violates their First Amendment right "not to associate with a private politically oriented organization." Appellants' brief at 87.

(1) *The Fact That Public Employee Unions Must Deal With Government As The Employer Does Not Make Their Collective Bargaining Activities "Political" In The Sense Used By This Court In Street and Allen.*

Although appellants concede that the collective bargaining activities of private sector unions can be financed by use of exacted funds, they argue that not even the bargaining table functions of a public sector union can be constitutionally supported by an agency shop arrangement. They reason that coerced monies may not be used for political causes; "all government programs and expenditures take shape in a political matrix"; public sector collective bargaining is designed to influence governmental programs and expenditures; therefore, the very act of collective bargaining is "political" and compelled money may not be used for such purposes. Appellants' brief at 62. The basic question appellants put to this Court, then, is whether the compelled financing of collective bargaining with an employer infringes upon the First Amendment rights of employees merely because the employer happens to be a public agency.

The fallacy in appellants' argument is that it is purely semantic. To paraphrase Justice Holmes, the contention that "... the subject matter ... is political

is little more than a play upon words." *Nixon v. Herndon*, 273 U.S. 536, 540 (1927). The mere fact that public sector unions must deal with the government as the employer in collective bargaining does not make the activities associated with collective bargaining any more "political" in the sense used in *Street* and *Allen* than similar activities of private sector unions in dealing with their employers.

Although the plurality opinion in *Street* dealt with statutory rather than constitutional distinctions, its discussion of the meaning of "political" activities should be helpful, if not persuasive, in defining the term in a constitutional context. There the Court said that the use of an employee's money over his objection:

"[T]o support candidates for public office, and advance political programs is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified." 367 U.S. at 768.

This distinction between "political" expenditures on the one hand and collective bargaining expenditures on the other was made again in *Allen*, where the Court stated that the remedy to avoid the improper expenditure of compelled funds must provide for "... a division of the union's political expenditures from those germane to collective bargaining, since only the former, to the extent made from exacted funds of dissenters, are not authorized" 373 U.S. at 121. And later the Court stated that "... no decree would be proper which

appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' . . . exactions in support of political activities." *Id.* at 122. Thus, whether or not this Court would find that compelled fees may constitutionally be used for "political" purposes, it is clear that expenditures for collective bargaining have been considered separate and distinct from "political" expenditures and the former type of expenditure has been held in *Hanson*, *Street* and *Allen* not to violate the First Amendment rights of dissenting fee payers.

Mr. Justice Douglas concurred in *Street* with an analysis of the effect of a union's use of compelled funds on First Amendment rights. Assuming that the Court might find that the use of such funds for certain purposes does infringe upon such rights, his opinion is helpful in determining what expenditures would be considered impermissible under a constitutional standard. First, Justice Douglas reiterated the *Hanson* holding that "it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost [footnote omitted]." 367 U.S. at 776. Then he stated that those compelled to pay funds to a union "should not be forced to surrender any matters of conscience, belief, or expression." *Id.* Emphasizing this distinction, Justice Douglas stated:

"The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red

China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action." *Id.* at 777.

Justice Douglas further cited the use of union funds for the purpose of influencing electoral politics as subordinating the individual's First Amendment rights to the views of the majority. Thus, he drew a distinction between permissible expenditures for collective bargaining and impermissible expenditures which go to matters of conscience and belief or to the political electoral process. Even Justice Black, who would have struck down Section 2, Eleventh of the Railway Labor Act as violating First Amendment rights because, in his view, it required an employee to pay for the promotion by the union of economic, scientific, political or religious doctrines or views he might oppose, agreed that Congress constitutionally could authorize the requirement that a worker pay dues to a union for the purpose of defraying the cost of acting as his bargaining agent. 367 U.S. at 791.

The fact that a public employee union must bargain with government as the employer does not make such bargaining "political" activity which goes to matters of conscience and belief. Rather, bargaining is the "cause which justified bringing the group together" (*Street*, 367 U.S. at 740, 778, Douglas, J., concurring). The cause which has led to the formation and growth of public employee unions is identical to that which prompted the organization of private sector workers—the employees' desire to secure improvements in wages, hours and other terms and conditions of employment. To that end, unions, both private and public, negotiate

and administer collective agreements. The compelled financing of the collective bargaining activities of a public employee union does not interfere with the "conscience and beliefs" of the employees it represents any more than does the exaction of fees to support the bargaining activities of a private sector union.

(2) *The Fact That Public Employee Unions Are Involved In The Political Process Does Not Distinguish Them from Private Sector Unions.*

Appellants argue that wholly apart from their involvement with government at the bargaining table, public employee unions are basically "political" in nature, and therefore compelled financial support for such unions violates the constitutional rights of those from whom the fees are exacted. This contention, apparently based on the supposition that public employee unions deal extensively with government in contexts other than collective bargaining, is no different from that made in the private sector cases which have upheld the exaction of financial support:

"The Nebraska Supreme Court in *Hanson*, upholding the employees' contention that the union shop could not constitutionally be enforced against them, stated that the union shop 'improperly burdens their right to work and infringes upon their freedoms. This is particularly true as to the latter because it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice.' *Hanson v. Union Pac. R. Co.*, 160 Neb. 669, 697, 71 N.W.2d 526, 546. *That statement was made in the context of the argument that compelling an individual to become a member of an orga-*

nization with political aspects is an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process." *International Association of Machinists v. Street*, 367 U.S. at 747. (Emphasis added).

The court rejected this argument in both *Hanson* and *Street*.

There is no question that public employee unions do engage to a considerable extent in the "political" process—if by that term we mean the interaction of citizens with government. But such activities do not differ significantly in either type or amount from the activities of private sector unions. The Court in *Street* was well aware of these activities. As Justices Frankfurter and Harlan stated in their dissent:

"The statutory provision [of the Railway Labor Act] cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular—activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade-union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers and leave out their so-called political activities and expenditures for them would be sheer mutilation." 367 U.S. at 800.

As counsel for one of the largest private sector unions informed this Court:

"For a hundred years, if Your Honors please, we have been engaged in political activity. Our own union Constitution, from its first day, urges it. One cannot draw a line between bargaining and politics. Bargaining is supplemented by legislation and legislation is supplemented by bargaining.

"Now, you cannot split legislation from bargaining. At the bargaining table we get Blue Cross and Blue Shield and at the Congress we ask for national health insurance to supplement it.

"In Congress we get unemployment compensation, and at the bargaining table we supplement it with supplementary unemployment payment. This is as one what you have here, the bargaining and the legislative process."

Statements of counsel for UAW in *United States v. International United Auto, etc., Workers*, 352 U.S. 567 (1957), at pp. 82-84 of official transcript of proceedings before the Supreme Court (Dec. 4, 1956) as quoted in Lane, "Analysis of Federal Law Governing Political Expenditures by Labor Unions," 9 *Labor Law Journal* 725 (1958).

Except for the interesting but irrelevant fact that public employee unions bargain with public employers, the purposes, functions and activities of public employee unions are virtually identical to those of their brother and sister unions representing private employees. All may engage to an extent in political, electoral, or ideological activity which may be offensive to an individual employee's conscience and beliefs. But this possibility does not render invalid a requirement that those who benefit from the collective bargaining activities of their exclusive representative pay their

fair share of the costs of those activities.¹⁸ The Court has fashioned relief in the private sector for employees who object to those expenditures which may go beyond legitimate collective bargaining-related functions; the same form of relief is available in the public sector. The essential point is that if the collective bargaining activities of private sector unions may be financed by means of union security provisions without offending the Constitution, the similar activities of public sector unions may, consistently with the Constitution, also be funded by compelling fees from all unit employees.

II. THE COURT BELOW IN ESSENCE SEVERED THE APPLICATION OF THE MICHIGAN STATUTE WHICH IT DEEMED UNCONSTITUTIONAL, AND THAT ACTION IS NOT SUBJECT TO REVIEW BY THIS COURT.

The Michigan Court of Appeals decided that the Michigan statute could not be construed—as this Court had construed the Railway Labor Act in *Street*—to deny the union the power, over an employee's objection, to use his money to support political causes which he opposes. The Michigan Court of Appeals concluded that because the statute permitted use of exacted fees for "political" causes, as that term was used in *Street*, the statute "could violate plaintiffs' First and Fourteenth Amendment rights." 60 Mich. App. at 100.

After concluding that the statute was susceptible to an unconstitutional application, the Court, in essence, severed that application from its constitutional aspect

¹⁸ As suggested by the Court in *Allen*, (373 U.S. at 122-123), the Detroit Federation of Teachers, appellee herein, has adopted "an internal union remedy" available to those dissenting from union expenditures asserted to be political in nature or not germane to collective bargaining. *Amicus* NEA has adopted a similar procedure.

of permitting expenditures to support collective bargaining activities. The Court accomplished this by providing that a union, once notified of an employee's objection to the "political" expenditures of the union, is required to refund that portion of the employee's money expended by the union for such causes. The Court thus provided a way in which the unconstitutional application of the statute could be severed while insuring that its fundamental purposes—i.e., the support of collective bargaining and the furtherance of labor stability—are carried out.

Michigan law provides as follows:

"If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by this court to be inoperable, and to this end acts are declared to be severable." MCLA 8.5, MSA 2.216.

The Michigan Court of Appeals, in effect, followed the dictates of this Michigan statute and upheld those aspects of the agency fee law which it found could be applied without infringing upon any constitutional rights.

While a severability statute is not essential to severability,¹⁹ the existence of such a statute "creates a presumption that, eliminating invalid parts, the legis-

¹⁹ *United States v. Jackson*, 390 U.S. 570, 585, n.27 (1968). See also *Tilton v. Richardson*, 403 U.S. 672, 684 (1971); *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring).

lature would have been satisfied with what remained. . . ." *Welsh v. United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring), quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 235 (1932). And, at least where a severability statute exists, the concept has been used to expend the scope of a law in order to cure its defects as an alternative to voiding the offending provision.

For example, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), this Court determined that application of a sterilization statute to persons habitually convicted of certain types of crimes but not to others violated the equal protection clause of the Fourteenth Amendment. The Court noted that the constitutional problem might be resolved either by contracting the class of criminals who might be sterilized or by enlarging that class. In *Welsh*, Justice Harlan characterized the Court's decision on this matter as follows:

"In *Skinner* the Court impliedly recognized the mandate of flexibility to repair a defective statute—even by extension—conferred by a broad severability clause." 398 U.S. at 365, n.17.

He noted:

"Where a statute is defective because of under-inclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239. . . ." 398 U.S. at 361[footnoted omitted].

Justice Harlan continued that

“While the necessary remedial operation, extension, is more analogous to a graft than amputation, I think the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.” 398 U.S. at 364 [referring to 50 U.S.C. App. 456(j), worded similarly to the Michigan severability law quoted above].

See also Moritz v. Commissioner of Internal Revenue, 469 F.2d 466, 470 (10th Cir. 1972).

The intent of the Michigan legislature, as expressly stated in Section (2) of the agency shop law, was to ensure “the stability and effectiveness of labor relations in the public sector. . . .” The severing out of the aspect of the law which would have permitted the expenditure of money for “political” causes over the objection of dissenters leaves the primary focus of the statute intact. *Cf. United States v. Jackson*, 390 U.S. at 586. Clearly, the Michigan legislature’s intent was to permit exacted fees to be used to help finance the collective bargaining activities of exclusive representatives. It can confidently be assumed that the legislature would not have discarded the entire statute merely because unions would not be able to apply the money of objecting fee payers to the “political” expenditures of the organization. The action of the Michigan Court of Appeals which in effect severed the application of the statute which it deemed unconstitutional was clearly in accord with the basic legislative intent embodied in its passage.

This action by the court below was a determination of state law controlling upon this Court. As stated by

Mr. Justice Brandeis in *Dorchy v. State of Kansas*, 264 U.S. 286, 290 (1924):

“The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. *Its decision as to the severability of a provision is conclusive upon this Court.* *Gatewood v. North Carolina*, 203 U.S. 531, 543, . . . *Guinn v. United States*, 238 U.S. 347, 366, . . . *Schneider Granite Co. v. Gast Realty Co.*, 245 U.S. 288, 290.” (emphasis added)

See Bell v. State of Maryland, 378 U.S. 226, 240-241 (1964); *Skinner v. Oklahoma*, 316 U.S. at 543.²⁰

CONCLUSION

For the foregoing reasons, *amicus* urges that the appeal be dismissed for want of a substantial federal question. In the alternative, the judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT H. CHANIN
DAVID RUBIN
STEPHEN M. NASSAU
ELISE T. SNYDER

1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae

²⁰ The decision of the court below provided appellants with effective relief by declaring that the appellee union could not use fees exacted from appellants for “political” causes over their objection.